TEXAS REGISTER

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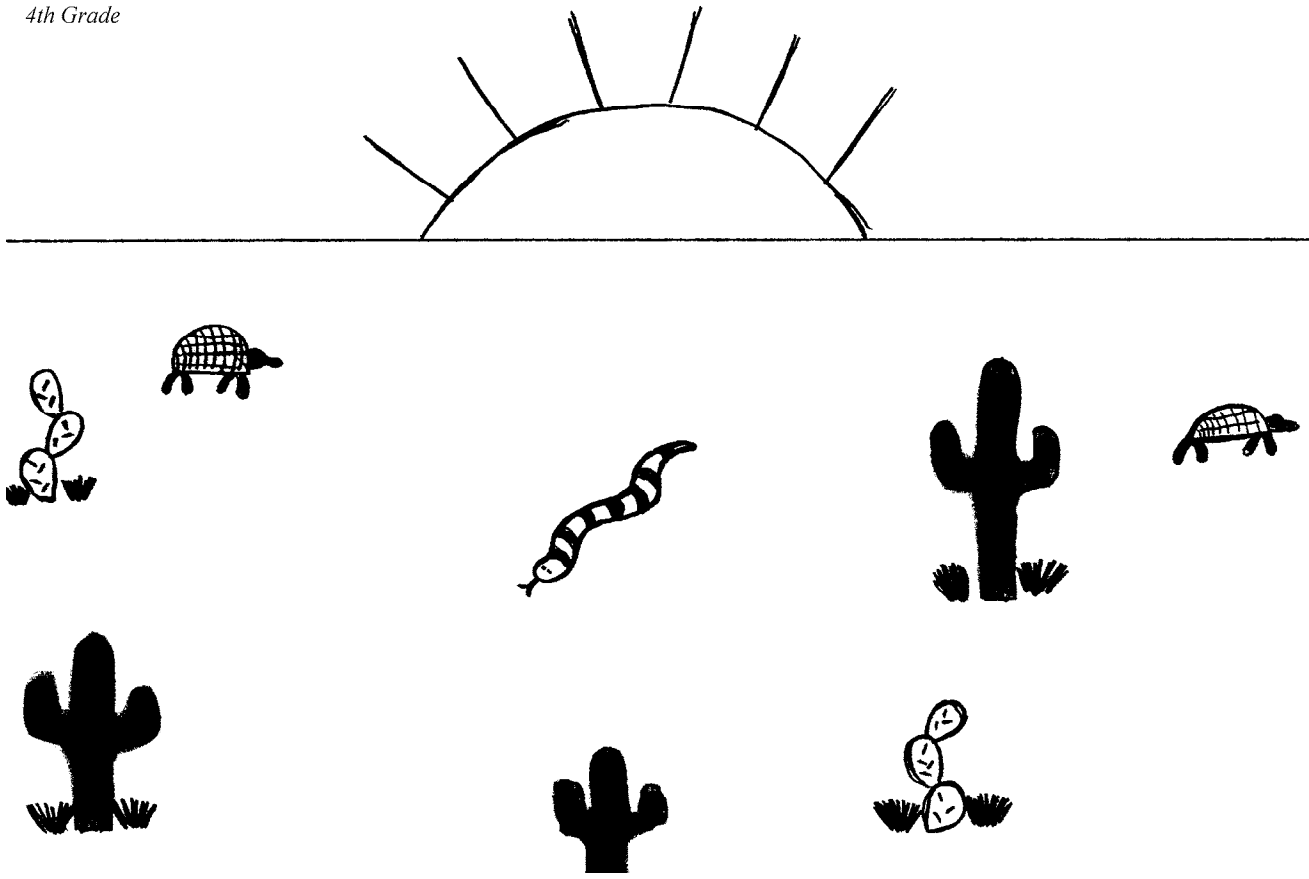
Steven Koehne
4th Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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ADOPTED RULES

TABLES AND GRAPHICS

IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for December 21, 2007

Appointed as Justice of the Fourteenth Appellate District, Place 4, for a term until the next General Election and until his successor shall be duly elected and qualified, Jeffrey Brown of Houston. Judge Brown is replacing Justice Harvey Hudson who resigned.

Appointed as Justice of the Fourteenth Appellate District, Place 6, for a term until the next General Election and until his successor shall be duly elected and qualified, William Boyce of Houston. Mr. Boyce is replacing Justice Richard Edelman who resigned.

Appointed as Judge of the 190th Judicial District Court, Harris County, for a term until the next General Election and until her successor shall be duly elected and qualified, Patricia Kerrigan of Houston. Ms. Kerrigan is replacing Judge Jennifer Elrod who was appointed to the United States Court of Appeals for the Fifth Circuit.

Appointments for December 27, 2007

Appointed as Judge of the 55th Judicial District Court, Harris County, for a term until the next General Election and until his successor shall be duly elected and qualified, Jeffrey Shadwick of Houston. Mr. Shadwick is replacing Judge Jeffrey Brown who was appointed to the 14th Court of Appeals.

Appointed as Judge of the El Paso Criminal Judicial District No. 1, pursuant to SB 1951, 80th Legislature, Regular Session, effective September 1, 2007, for a term until the next General Election and until his successor shall be duly elected and qualified, Don Minton of El Paso.

Appointed to the Texas Board of Nursing for a term to expire January 31, 2009, Mary Jane Salgado of Eagle Pass (replacing Phyllis Rawley of El Paso who resigned).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2009, Sheri Crosby of Mesquite (replacing Anita Palmer of Olney who resigned).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2013, Richard Gibbs of Mesquite (Mr. Gibbs is being reappointed).

Appointed to the Texas Board of Nursing for a term to expire January 31, 2013, Marilyn Davis of Sugar Land (replacing Virginia Campbell of Fort Worth whose term expired).

Appointed to the Governor's Advisory Council on Physical Fitness for a term to expire at the pleasure of the Governor, Craig Keelan of Frisco (replacing Todd Whitthorne of Coppell).

Appointed to the Governor's Advisory Council on Physical Fitness for a term to expire at the pleasure of the Governor, Scott Cary of Buda (replacing Scott Kubitz of El Paso).

Appointed to the Governor's Advisory Council on Physical Fitness for a term to expire at the pleasure of the Governor, Richard Hayley of Sandia (replacing Fabrizio Mancini of Dallas).

Appointed to the Governor's Advisory Council on Physical Fitness for a term to expire at the pleasure of the Governor, Frank Ashley of College Station (replacing Susan Howard-Chrane of Boerne).

Appointed to the Governor's Advisory Council on Physical Fitness for a term to expire at the pleasure of the Governor, Lucy Buencamino of Spring (replacing Elizabeth Gonzales of San Antonio).

Appointed to the Juvenile Justice Advisory Board for a term to expire at the pleasure of the governor, Jim Kester of Austin.

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2009, John Jenkins of Hankamer (replacing Sylvia Greene of Arlington who resigned).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2009, Kevin Maxwell of Crockett (replacing Ed Hargett of Crockett who resigned).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2009, Manny Rachal of Livingston (replacing Benny Fogleman of Livingston whose term expired).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2009, Shirley Seale of Anahuac (replacing John Jenkins of Hankamer).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2011, Herschel Brannen, III of Trinity (replacing Russell Arnold of Trinity who resigned).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2011, Steve Cronin of Shepherd (reappointment).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2013, Pat Carlson of Fort Worth (replacing Louis Sturns of Fort Worth whose term expired).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2013, Andrew Martinez of Huntsville (Mr. Martinez is being reappointed).

Appointed to the Trinity River Authority Board of Directors for a term to expire March 15, 2013, Ana Laura Saucedo of Dallas (Ms. Saucedo is being reappointed).

Appointed to the Sabine River Authority Board of Directors for a term to expire July 6, 2011, Don O. Covington of Orange (Mr. Covington is being reappointed).

Appointed to the Sabine River Authority Board of Directors for a term to expire July 6, 2011, Clarence Earl Williams of Orange (Mr. Williams is being reappointed).

Appointed to the Sabine River Authority Board of Directors for a term to expire July 6, 2011, J.D. Jacobs of Rockwall (Mr. Jacobs is being reappointed).

Appointed to the Sabine River Authority Board of Directors for a term to expire July 6, 2013, Cliff Todd of Carthage (replacing Claudia Abney of Marshall whose term expired).

Appointed to the Sabine River Authority Board of Directors for a term to expire July 6, 2013, David Koonce of Center (replacing Sammy Dean Dance of Center whose term expired).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2009, James Clancy of Portland (replacing John Howell of Midland whose term expired).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2009, Scott Bledsoe of Oakville (Mr. Bledsoe is being reappointed).

Appointed to the Nueces River Authority Board of Directors for a term to expire February 1, 2011, John Galloway of Beeville (replacing Steve Beever of Pearsall whose term expired).

Appointed to the Select Commission on Higher Education & Global Competitiveness, pursuant to HCR 159, 80th Legislature, Regular Session for a term to expire November 1, 2008, Claud Kern Wildenthal of Dallas.

Appointed to the Select Commission on Higher Education & Global Competitiveness, pursuant to HCR 159, 80th Legislature, Regular Session for a term to expire November 1, 2008, Woody Hunt of El Paso.

Appointed to the Select Commission on Higher Education & Global Competitiveness, pursuant to HCR 159, 80th Legislature, Regular Session for a term to expire November 1, 2008, Bernie Francis of Carrolton.

Appointed to the Select Commission on Higher Education & Global Competitiveness, pursuant to HCR 159, 80th Legislature, Regular Session for a term to expire November 1, 2008, A.W. Riter of Tyler.

Appointed to the Select Commission on Higher Education & Global Competitiveness, pursuant to HCR 159, 80th Legislature, Regular Session for a term to expire November 1, 2008, Robert Shepard of Harlingen.

Appointed to the Environmental Flows Advisory Group, pursuant to HB 3 and SB 3, 80th Legislature, Regular Session, for a term to expire at the pleasure of the Governor, Karen Hixon of San Antonio.

Appointed to the Environmental Flows Advisory Group, pursuant to HB 3 and SB 3, 80th Legislature, Regular Session, for a term to expire at the pleasure of the Governor, Bryan Shaw of Bryan.

January 3, 2008

Appointed to the Office of the Public Utility Counsel, effective January 4, 2008, for a term to expire February 1, 2009, Joel Don Ballard of Austin (replacing Suzette Ray McClellan of Austin whose term expired).

Rick Perry, Governor

TRD-200800089

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0654-GA

Requestor:

The Honorable Kevin Bailey

Chair, Committee on Urban Affairs

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Eligibility of particular individuals to sign a zoning change protest under section 211.006(d)(2), Local Government Code (RQ-0654-GA)

Briefs requested by January 31, 2008

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200800016
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: January 2, 2008

♦ ♦ ♦

Request for Opinions

RQ-0655-GA

Requestor:

The Honorable Fred Hill

Chair, Committee on Local Government Ways and Means

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Implementation of changes to tax proceedings required by House Bill 1010, Act of May 17, 2007, 80th Leg., R.S., ch. 648, Tex. Gen. Laws 1223, which provides for the consolidation of appraisal districts (RQ-0655-GA)

Briefs requested by January 31, 2008

RQ-0656-GA

Requestor:

The Honorable Jeri Yenne

Brazoria County Criminal District Attorney

County Courthouse

111 East Locust, Ste 513A

Angleton, Texas 77515

Re: Wet/Dry Status of Certain Precincts within Brazoria County (RQ-0656-GA)

Briefs requested by February 4, 2008

RQ-0657-GA

Requestor:

The Honorable Jeb McNew

Montague County Attorney

Montague County Courthouse

Post Office Box 336

Montague, Texas 76251-0336

Re: Whether county officials who handle fee funds may set up individual accounts in their own name (RQ-0657-GA)

Briefs requested by February 4, 2008

RQ-0658-GA

Requestor:

Mr. Robert Scott

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Applicability of impact fees assessed against school district property under chapter 395, Local Government Code (RQ-0658-GA)

Briefs requested by February 4, 2008

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200800108

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: January 9, 2008

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Opinions

Opinion No. GA-0588

The Honorable John R. Roach

Collin County Criminal District Attorney

Collin County Courthouse

210 South McDonald, Suite 324

McKinney, Texas 75069

Re: A law enforcement agency's authority concerning money seized as contraband pending a court's rendition of final judgment (RQ-0595-GA)

S U M M A R Y

Under article 59.03(c)(3) of the Code of Criminal Procedure, a peace officer may require a law enforcement agency to take custody of property, including money, that has been seized as contraband. The law enforcement agency's authority and responsibility to maintain custody under the article, subject to other law, continues until a court directs the property's disposition in a final judgment. The law enforcement agency has reasonable discretion to choose the means of maintaining custody of such property. However, a law enforcement agency does not have independent authority to deposit and maintain money seized as contraband in an interest-bearing account, and may do so only pursuant to court order.

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200800109
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: January 9, 2008

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request

AOR-541. The Texas Ethics Commission has been asked to consider whether an elected judge may use political contributions to pay the premiums of a Judge's Professional Liability Insurance Policy.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; and (9) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200800101
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: January 8, 2008

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §1.211

The Texas Department of Agriculture (the department) proposes new §1.211, concerning the Texas Organic Agriculture Industry Advisory Board. New §1.211 adds the Texas Organic Agriculture Industry Advisory Board to the list of the department's advisory boards and committees, states the purpose and duties of the Board, and specifies how the Board will report to the department.

Gene Richards, assistant commissioner for marketing and promotion, has determined that for the first five years the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Richards also has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be to provide interested members of the public with accurate information regarding the department's advisory Boards. For the first five-year period the new section is in effect, there will be no economic cost for micro-businesses, small businesses or individuals who are required to comply with the section, as proposed.

Comments on the proposal may be submitted to Gene Richards, Assistant Commissioner for Marketing and Promotion, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

New §1.211 is proposed under the Texas Government Code, §2110.005, which requires that an agency that establishes an advisory Board adopt rules to state the purpose and tasks of the Board and manner in which the Board shall report to the agency; and §50C.002 which authorizes the Commissioner of Agriculture to appoint a the Texas Organic Agriculture Industry Advisory Board.

The code affected by the proposal is the Texas Government Code, Chapter 2110 and the Texas Agriculture Code, Chapter 50C.

§1.211. The Texas Organic Agriculture Industry Advisory Board.

(a) Purpose. The Texas Organic Agriculture Industry Advisory Board (Board) is appointed by the Commissioner of Agriculture (Commissioner) pursuant to the Texas Agriculture Code, §50C.002 and is established within the Texas Department of Agriculture (the department) to assist the Commissioner in expanding, developing and promoting the Texas organic agricultural products industry.

(b) Duties. The Board shall assist the Commissioner: with assessing the state of the Texas organic agricultural products industry, recommending how to promote and expand the Texas organic agricultural products industry in Texas, with obtaining grants and gifts to promote and expand the Texas organic agricultural products industry in Texas; with developing a statewide organic agricultural products education and awareness campaign; and with reviewing and providing guidance on rules on the Texas organic agricultural products industry.

(c) Reporting. Reporting takes place through meetings held by the Board. Through these meetings, the Commissioner and/or department staff discusses matters related to the Board's business and the Board provides oral feedback and direction. The department staffs the Board. Department staff prepares and maintains the minutes of each advisory Board meeting. Staff maintains a record of actions taken and distributes copies of approved minutes and other Board documents to Board members and the Commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800052
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-4075

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SUBCHAPTER L. URBAN SCHOOLS GRANTS PROGRAM

4 TAC §§1.800, 1.802, 1.803

The Texas Department of Agriculture (the department) proposes amendments to Chapter 1, Subchapter L, concerning the department's Urban Schools Grants Program. The proposed amendments to §§1.800, 1.802 and 1.803 add middle schools to the type of public schools eligible for grants under the program to make the rules consistent with amendments made to Texas Agriculture Code, Chapter 48, the statutory authority for the program, by Senate Bill 827, 80th Regular Session, 2007.

Brian Murray, assistant commissioner for external relations, has determined that for the first five years the amended sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amended sections.

Mr. Murray also has determined that for each year of the first five years the amended sections are in effect the public benefit anticipated as a result of enforcing the amended sections will be to provide public middle schools to apply for grant funds under the Urban Schools Grants Program. For the first five-year period the amended sections are in effect, there will be no economic cost for micro-businesses, small businesses or individuals who are required to comply with the sections, as proposed.

Comments on the proposal may be submitted to Brian Murray, Assistant Commissioner for External Relations, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments to §§1.800, 1.802 and 1.803 are proposed under the Texas Agriculture Code, §48.001, which authorizes the department by rule to develop a program to award grants to public elementary and middle schools located in large urban school districts for the purpose of establishing demonstration agricultural projects or other projects designed foster an understanding and awareness of agriculture.

The code affected by the proposal is the Texas Agriculture Code, Chapter 48.

§1.800. Statement of Purpose.

The Urban Schools Grant Program is designed to establish demonstration agricultural projects or other projects designed to foster an understanding and awareness of agriculture in certain Texas urban public school districts by awarding grants of $2,500 to eligible elementary and middle schools.

§1.802. Eligibility.

Subject to available funds, public elementary and middle schools from urban public school districts in the state are eligible to receive a grant under this subchapter if the schools submit to the department a proposal that includes:

(1) - (3) (No change.)

§1.803. Selection.

(a) (No change.)

(b) The review panel shall be composed of the following:

(1) one person having experience or expertise in developing elementary and/or middle school curriculum;

(2) - (7) (No change.)

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800053
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-4075

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TITLE 13. CULTURAL RESOURCES

PART 8. TEXAS FILM COMMISSION

CHAPTER 121. TEXAS MOVING IMAGE INDUSTRY INCENTIVE PROGRAM

13 TAC §§121.1 - 121.14

The Office of the Governor, Texas Film Commission (Commission) proposes new §§121.1 - 121.14, concerning the new Texas Moving Image Industry Incentive Program.

The new rules are proposed because House Bill 1634 of the 80th Legislature created an incentive program offering grants equal to 5% of total in-state spending to feature films, television programs, commercials, and video games.

Proposed §121.1 sets forth the background and purpose of the program.

Proposed §121.2 sets forth the definitions of the program.

Proposed §121.3 sets forth the eligibility requirement for an entity to apply for funds.

Proposed §121.4 sets forth an entity's ineligibility to apply for funds.

Proposed §121.5 sets forth eligible and ineligible in-state spending that can be used to calculate an entity's grant amount.

Proposed §121.6 sets forth the maximum grant that an entity can receive.

Proposed §121.7 sets forth the grant amounts for entities using underused areas.

Proposed §121.8 sets forth the application requirements and entity responsibilities.

Proposed §121.9 sets forth the application processing and review procedures conducted by the Commission.

Proposed §121.10 sets forth the reasons for an entity's disqualification from the program.

Proposed §121.11 sets forth the Commission's procedures for verifying Texas expenditures.

Proposed §121.12 sets forth the requirements for disbursement of funds.

Proposed §121.13 sets forth the procedures for the program to receive additional funding.

Proposed §121.14 sets forth the parameters for revocation and recapture of incentives.

Bob Hudgins, Director of the Texas Film Commission, has determined that there will be no fiscal implications to the state or to local governments as a result of the proposed new rules. No cost to either government or the public will result from the proposed new rules. There will be no impact on small businesses or micro-businesses.

Mr. Bob Hudgins has also determined that the public benefit anticipated as a result of the proposed new rules is a clearer understanding of the program's scope and participation in the program. No economic costs are anticipated to persons who are required to comply with the proposed new rules.

Written comments on the proposed new rules may be hand delivered to the Office of the Governor, General Counsel Division, 1100 San Jacinto, Austin, Texas 78701, mailed to P.O. Box 12428, Austin, Texas 78711-2428, or faxed to (512) 463-1932 and should be addressed to the attention of Michael Bryant, Assistant General Counsel. Comments must be received within

30 days of publication of the proposed new rules in the *Texas Register*.

The new rules are proposed pursuant to the Texas Government Code, §485.022, which directs the Commission to develop a procedure for the submission of grant applications and the awarding of grants, and Government Code, Chapter 2001, Subchapter B, which prescribes the standards for rulemaking by state agencies.

No other codes, statutes, or articles are affected by this proposal.

§121.1. Background and Purpose.

(a) Background.

(1) The Texas Moving Image Industry Incentive Program offers grants equal to 5% of total in-state spending, including wages paid to Texas residents. Grants are available upon project completion to feature films, television programs, commercials, and video games. Both live-action and animated projects are eligible. These grants are in addition to our existing Sales Tax Exemptions.

(2) The State of Texas has allocated $10,000,000 for fiscal year 2008 (September 1, 2007 to August 31, 2008) and $10,000,000 for fiscal year 2009 (September 1, 2008 to August 31, 2009) for the Incentive Program. Applicants will not be able to receive funding until after September 1, 2007.

(b) Purpose.

(1) The Texas Moving Image Industry Incentive Program was implemented to increase employment opportunities for Texas industry professionals, as well as boost economic activity in Texas cities and the overall Texas economy. Rather than Texas being an exporter of talent, Texas can now attract a wide range of projects from traditional film and commercial productions to the technology driven animation and video game productions.

(2) This program allows for growth of the indigenous segments of production. It is an important goal of this program to have Texas' talented workforce stay in Texas and realize real professional growth in the industry. The incentive program increases the value of the Texas workforce and the viability of the small businesses that rely on production activity, increasing Texas' capacity to take on more production activity and increasing Texas competitive edge.

§121.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--The potential financial recipient of the grant either producing the project or the owner of the copyright.

(2) Business day--A day other than Saturday, Sunday or a legal holiday.

(3) Cast--All people who appear or perform in front of the camera, including but not limited to, featured actors, extras, and interviewees.

(4) Department head--A manager or lead person who supervises and directs a department or group of one or more people, and who is ultimately responsible for the management of a particular division within a project.

(5) Eligible projects--Feature films, television programs, commercials, and video games that meet the qualifying requirements described in §121.3 of this chapter.

(6) Final expended budget--The total of in-state spending at the completion of the project that includes all receipts, invoices, pay orders, and any other documentation considered necessary for audit.

(7) Game console--An electronic device or machine used by consumers primarily for the purpose of playing video games, including, but not limited to, the Nintendo Wii, the Sony PlayStation 3, the Sony PlayStation 2 and the Microsoft Xbox360.

(8) Goods and services--Physical products and services directly attributable to the production of a project that include, but are not limited to, contractors, subcontractors and service providers, and product or equipment purchases, rentals and leases.

(9) Handheld console--A portable electronic device used by a consumer primarily for the purpose of playing video games, including, but not limited to, the Sony PlayStation Portable, the Nintendo DS, the Nintendo Game Boy Advanced and the Nintendo Game Boy Color.

(10) Ineligible projects--Projects that do not qualify for the grant, as stated in §121.4 of this chapter.

(11) In-state spending (Texas spend)--The amount of money spent in Texas by a production company during pre-production, production and postproduction of the project.

(12) Mobile electronic--A portable electronic device used by a consumer for the purpose of mobile computing and communication, including, but not limited to, personal digital assistants (PDAs) and mobile phones.

(13) Pass through company--A company or person that acts as an agent or broker for companies or persons outside of Texas to provide goods or services for the purpose of taking advantage of the Texas Moving Image Industry Incentive Program.

(14) Personal computer--An electronic device or machine used by a consumer for a variety of applications, including playing games. Games for this platform include those which play on the computer's CPU, as well as web and online game applications that are played using the personal computer.

(15) Physical production--The period encompassing pre-production, production, and postproduction.

(16) Postproduction expenditures--Expenditures that occur after the end of production, as defined in paragraph (19) of this section, including, but not limited to, editing, music, sound, and visual effects.

(17) Pre-production--The period where preparations are made for principal photography.

(18) Principal start date--

(A) For film, television, or commercial projects, this is the first day of principal photography.

(B) For video game and animated projects, this is the first day of production.

(19) Production--has different definitions for film, television, commercial, and video game projects.

(A) For film, television, or commercial projects, this is the period between the first and last days of principal photography, inclusive.

(B) For video game and animated projects, this is the period between the end of pre-production and the creation of the gold master.

(20) Production company--A film production company, television production company, video game developer, commercial production company, or film and television production company.

(21) Series of commercials--More than one commercial created in a contiguous production period and promoting the same product, service, or idea.

(22) Stand-alone arcade machine--An electronic device used by a business or consumer solely for bona fide amusement purposes that reward the player exclusively with non-cash merchandise prizes or a representation of value redeemable for those items, as outlined in Texas Penal Code, §47.01.

(23) Texas crew--An individual directly employed by the production company that is involved in the creation of this specific project.

(24) Texas resident--An individual who has resided in Texas for at least 120 days prior to the principal start date.

(25) Underused area--Any area of Texas outside a 30-mile radius from Austin City Hall or Dallas City Hall.

§121.3. Eligible Projects.

(a) A project may be eligible for a grant under the Texas Moving Image Industry Incentive Program if it is a permitted project listed below that meets the minimum requirements.

(b) Feature Films.

(1) A feature film is defined as any:

(A) live-action or animated for-profit production, narrative or documentary;

(B) that is more than 30 minutes in length; and

(C) that is produced for distribution in theaters or by DVD, internet, or mobile electronic device.

(2) Minimum Requirements:

(A) Feature films must have minimum in-state spending of $1 million.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the total number of paid crew must be Texas residents.

(D) 70% of the total number of paid cast, including extras, must be Texas residents.

(E) Animated feature films must have 70% of the combined total of paid crew and cast, including extras, be Texas residents.

(c) Television Programs.

(1) A television program is defined as any:

(A) live-action or animated for-profit production, narrative or documentary, including, but not limited to:

(i) an episodic series;

(ii) a miniseries;

(iii) a television movie ("MOW");

(iv) a television pilot; or

(v) a television episode;

(B) that is produced for distribution via broadcast or digital distribution via cable, satellite, the internet, or mobile electronic devices.

(2) Minimum Requirements:

(A) Television programs must have minimum in-state spending of $1 million per season.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the total number of paid crew must be Texas residents.

(D) 70% of the total number of paid cast, including extras, must be Texas residents.

(E) Animated television programs must have 70% of the combined total of paid crew and cast, including extras, be Texas residents.

(d) Commercials.

(1) A commercial is defined as any:

(A) live-action or animated production;

(B) that is an individual commercial, series of commercials, music video, infomercial, or interstitial;

(C) that is less than 30 minutes in length;

(D) that is made for the purpose of promoting a product, service, or idea; and

(E) that will receive distribution via broadcast or digital distribution via cable, satellite, the internet, or mobile electronic devices.

(2) Minimum Requirements:

(A) Commercials must have minimum in-state spending of $100,000.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the combined total of paid crew and cast, including extras, must be Texas residents.

(e) Video Games.

(1) A video game is defined as any:

(A) piece of software that provides a user or users with a game to play for the purpose of entertainment or education, such as for military or medical functions; and

(B) that is created for a game console, personal computer, handheld console, mobile electronic or stand-alone arcade machine.

(2) Minimum Requirements:

(A) Video games must have minimum in-state spending of $100,000.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the combined total of paid crew and cast must be Texas residents.

§121.4. Ineligible Projects.

(a) The following types of projects are not eligible for grants under this program:

(1) unscripted television productions, such as reality shows;

(2) pornography, as defined by Texas Penal Code, §43.21;

(3) news, current event or public programming, or programs that include weather or market reports;

(4) talk shows, game shows, questionnaire or contest shows;

(5) sporting events or activities;

(6) awards shows, galas or telethons;

(7) educational, corporate, or training videos;

(8) films intended for undergraduate or graduate course credit;

(9) application software, system software, or middleware; or

(10) casino-type video games directly used in a gambling device, as pursuant to Texas Penal Code, §47.01.

(b) Not every project will qualify for a grant. The State of Texas is not required to make grants to projects that include inappropriate content or content that portrays Texas or Texans in a negative fashion. As part of the preliminary application process, the Texas Film Commission will review the script or game design document, and will advise the applicant on whether the content will exclude the project from receiving a grant.

(c) Once an approved project has been completed, the Texas Film Commission will review the final script or game content before issuing the grant, to ensure that revisions made during production have not created an extreme difference from the content as initially approved.

§121.5. Eligible and Ineligible In-State Spending.

(a) The following are eligible expenditures:

(1) Wages and per diems paid to Texas residents, including additional compensation paid as part of a contractual or collective bargaining agreement.

(A) For the purpose of calculating the grant amount for feature films, video games, and commercials, only the first $50,000 in wages to each Texas resident, and only the first $200,000 of each Texas resident working as a department head, will be included.

(B) For the purpose of calculating the grant amount for episodic television, only the first $100,000 in wages to each Texas resident, and only the first $200,000 of each Texas resident working as a department head, will be included.

(2) Payments made to Texas companies for goods and services domiciled in Texas that are directly attributable to the physical production of the feature film, television program, commercial or video games. In the case of video games, the amount attributed to pre-production and research and development costs will be limited to an amount not to exceed 30% of the project's overall in-state spending.

(3) Payments for shipping on items shipped from or within Texas.

(4) Air travel to and from Texas on a Texas-based airline, including American Airlines, Continental Airlines and Southwest Airlines, or on a Texas-based air charter service.

(5) Rentals, leases and purchases of vehicles registered and licensed in the State of Texas.

(6) Music that is specifically created for the project and fees paid to Texas residents hired to create, orchestrate and perform the music.

(7) Legal fees directly attributable to the production.

(b) The following are ineligible expenditures:

(1) Payments made to non-Texas companies.

(2) Payments made for goods and services not domiciled in Texas.

(3) Payments made for goods and services that are not directly attributable to the physical production.

(4) Payments made by video game projects for pre-production costs that exceed 30% of the project's overall in-state spending.

(5) Expenses related to distribution, publicity, marketing, or promotion of the project.

(6) Rental, Lease or Mortgage payments, that includes, but is not limited to utilities and insurance, on facilities that are part of the permanent/continuous business operation.

(7) Wages and per diems paid to non-Texas residents.

(8) Payments made to pass-through companies.

(9) Fees for story rights, music rights or clearance rights.

(c) The Texas Film Commission reserves the right to determine which expenses are eligible or ineligible. These lists are not all inclusive.

§121.6. Maximum Award.

(a) Feature Films. The maximum grant amount for a feature film is $2 million.

(b) Television Programs. The maximum grant amount for a television program is $2.5 million. This is for an entire season of an episodic television series.

(c) Commercials. The maximum grant amount for a television commercial, series of commercials, music video, infomercials or interstitial is $200,000.

(d) Video Games. The maximum grant amount for a video game is $250,000.

§121.7. Underused Areas.

(a) Projects that complete at least 25% of their total production in underused areas may receive an additional 1.25% of total in-state spending. The additional 1.25% applies to all spending in all areas of Texas; it is not restricted to the underused-area spending.

(b) The underused-area clause does not increase the maximum grant per project, but it does allow a project to reach the maximum more quickly.

§121.8. Grant Application.

(a) Initial Submission.

(1) Qualifying Applications are available at the Texas Film Commission web site: http://www.governor.state.tx.us/divisions/film/incentives/application, or by contacting the Texas File Commission if internet access is not available or special needs facilitation is required.

(2) Applications will not be accepted earlier than 30 calendar days prior to a project's principal start date.

(3) Applications must be received no later than 5:00 p.m. Central Time on the last business day prior to the principal start date.

(4) Only one application and applicant per project is allowed.

(5) An application package must include:

(A) A completed Qualifying Application for the Moving Image Industry Incentive Program;

(B) An itemized budget of eligible Texas expenditures. Ineligible expenditures are not required; and

(C) A script.

(i) For feature films and television programs, a full script.

(ii) For episodic television, the full script of the first episode to be filmed in Texas, and subsequent episode scripts as available.

(iii) For commercials, the script and/or storyboard.

(iv) For video games, the game design document.

(b) Additional Requirements.

(1) An applicant must confirm with the Texas Film Commission in writing that production began on time, within 5 days of the start date indicated on the application. If the start of the project is delayed for more than 30 days, an application will be discarded and the production must reapply.

(2) Upon commencement of the production, an applicant will be required to submit a crew and vendor/services provider contact list to the Texas Film Commission. The applicant will also be required to show proof of the residency status of employees.

§121.9. Processing and Review of Applications.

(a) All applications will be reviewed in the order they are received.

(b) Initial Review.

(1) Each application will go through an initial review process when the qualifying application has been received.

(A) If a project submits an application with required materials, and meets all qualifications, the applicant will receive an email notifying them that the Texas Film Commission has received their complete application and the review process will begin.

(B) If a project submits an application without the required materials, but initially appears to meet the minimum qualifications, the applicant will receive an email notifying them that their application requires additional materials or documentation, and that not receiving them in a timely manner may result in an application being disqualified.

(C) If a project submits an application with or without required materials and does not meet the minimum qualifications, the applicant will receive an email notifying them that they do not qualify for the incentive program, but may reapply before 5:00 p.m. Central Time on the last business day prior to the principal start date.

(2) After an email is sent to a qualifying applicant, the Texas Film Commission will contact the applicant to verify that all the information on the application is correct. Applicants will have the ability at that time to amend their application. The Texas Film Commission may determine whether an applicant's amendment(s) will require them to reapply or not.

(c) Preliminary Award Determination.

(1) During the preliminary award determination process, the Texas Film Commission will review the project's budget to identify eligible expenditures and to determine if the applicant meets the minimum in-state spending.

(2) Texas Film Commission will provide a summary to the Governor's Office of Budget and Planning for verification and determination of the grant agreement.

(3) The Texas Film Commission will also review project's content to determine if it is appropriate.

(d) Grant Agreement.

(1) Upon Texas Film Commission approval of the Qualifying Application and additional materials, a grant agreement will be executed between the Texas Film Commission and the applicant. The estimated grant amount will be based upon the applicant's estimated in-state spending, with a 10% contingency included in the encumberment. The project's application summary will be attached to the grant agreement.

(2) The grant agreement must be returned to the Texas Film Commission within 7 business days with original signatures.

(e) Periodic Tracking and Review. Once the grant agreement has been executed by both parties, the Texas Film Commission and/or the Governor's Office of Budget and Planning may periodically review production activity including, but not limited to, in-state spending, shooting locations and number of Texas residents hired, and may require documentation for all of the above.

(f) Verifying Texas Residency. During the production of the project, the applicant will be required to provide the Texas Film Commission with proof of each employee's residency status. This will verify that the applicant indeed meets the minimum crew and cast requirements. The applicant can show proof by providing each employee's I-9 form.

§121.10. Disqualification of an Application.

(a) An applicant may be disqualified at any time if a project does not meet the necessary requirements or if an application is incomplete. If a project is disqualified, the applicant will be notified by email. Applications that have been disqualified may be resubmitted with the required changes, no earlier than 30 calendar days before the principal start date, and no later than 5:00 p.m. Central Time on the business day preceding the principal start date.

(b) In the case of a change in principal start or completion date, the applicant must notify the Texas Film Commission by email of the new principal start or completion date, and must give the reason(s) for the change. If the start of the project is delayed for more than 30 days, an application will be discarded and the production must reapply.

(c) An application may also be disqualified for the following reasons:

(1) Failure to submit required documents and notifications, or additional documents as requested;

(2) Failure to meet minimum thresholds for in-state spending, number of Texas residents hired, and/or adequate percentage of production days;

(3) Submission of false information;

(4) Inappropriate content or content that portrays Texas or Texans in a negative fashion described in Texas Penal Code Annotated §43.23; or

(5) Ineligible project as listed in §121.4 of this chapter.

§121.11. Confirmation and Verification of Texas Expenditures.

(a) Film Commission will be responsible for collecting, authenticating and assembling incentive documentation from the productions for audit by the Governor's Financial Services Division.

(b) The following items must be received by the Texas Film Commission within 60 days of completing Texas expenditures:

(1) A final expended budget, in a format acceptable to the Office of the Governor, Financial Services Division, reflecting all in-state spending and including all receipts, invoices, pay orders, and any other documentation considered necessary by the Financial Services Division for audit.

(2) Feature films and television programs must submit a copy of the final script for review.

(3) Commercials and video games must submit final content for review.

(4) Additional documentation may be required including, but not limited to, the following:

(A) Financials, including all reports of expenditures

(B) Call sheets/Production reports

(C) Production Cost reports

(D) Video game production calendar

(E) Texas Residents--I-9 Forms

§121.12. Disbursement of Funds.

(a) Disbursement of funds will not occur until the production company has paid all financial obligations incurred in the State of Texas, and a final compliance audit has been completed and approved.

(b) In the event of disputed amounts, the Texas Film Commission will determine whether or not to withhold final grant approval, pending settlement.

§121.13. Additional Funding.

(a) Additional funding for the Texas Moving Image Industry Incentive Program may be authorized under Appropriations Bill (House Bill 1).

(b) Projects that have applied and initially approved for participation in the program, after the initial funding source has been encumbered, will be notified that the funds for their project will be dependent on verification by the Comptroller of Public Accounts before submission of the financial plan to the Legislative Budget Board and the Office of the Governor.

(c) The Texas Film Commission will base additional requests for funding on applications received for the fiscal year that the payment of the award will be made. Once $10M of funds have been encumbered for a fiscal year, the Film Commission will present additional applications to the Comptroller of Public Accounts to determine that the requests have met the required criteria of fiscal responsibility. Once the value of the applicants' projects has been determined, the Comptroller of Public Accounts and the Film Commission will present the proposed allocation of funds to the Legislative Budget Board and the Office of the Governor for approval.

§121.14. Revocation and Recapture of Incentives.

(a) An applicant's eligibility for funds can be revoked after the project is completed for reasons such as obscene content, failure to provide receipts of Texas expenditures, providing false information, or inability to complete the project.

(b) If an applicant has already received the grant and is determined to not meet a requirement in any way, the Texas Film Commission can require that the applicant refund any sum of money paid to the applicant by the Texas Film Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800049
Michael Bryant
Assistant General Counsel
Texas Film Commission
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-5846

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 68. ELIMINATION OF ARCHITECTURAL BARRIERS

16 TAC §68.74

The Texas Department of Licensing and Regulation ("Department") proposes amendments to an existing rule at 16 Texas Administrative Code, §68.74, concerning continuing education requirements for registered accessibility specialists in the elimination of architectural barriers program. The Commission of Licensing and Regulation ("Commission") adopted §68.74 as a new rule effective March 1, 2007. The rule as adopted requires registered accessibility specialists to complete eight hours of continuing education as a condition of renewing the certificate of registration. Four of the hours must be in Department-approved courses offered by providers that are registered with the Department. Subsection (i) states that the rule applies to certificates of registration that expire on or after March 1, 2008.

The proposed amendment to subsection (i) would require continuing education for those certificates of registration expiring on or after March 1, 2009. This change would extend the time for registered accessibility specialists to comply with continuing education requirements. The change is needed because not enough continuing education providers have sought Department approval to offer continuing education courses to registered accessibility specialists. Because of this, registered accessibility specialists needing to renew their certificates of registrations beginning March 1, 2008 will have difficulty meeting the continuing education requirements. The Department expects that the extension of time will allow for additional providers to obtain approval for continuing education courses.

This rule is necessary to implement Texas Occupations Code, §51.405, which requires the Commission to recognize, prepare, or administer continuing education programs for license holders.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the amended rule is in effect there will be no impact to costs or revenues of the State in enforcing or administering the amended rule. There will be no impact to costs or revenues of local government as a result of enforcing or administering the amended rule.

Mr. Kuntz also has determined that for each year of the first five-year period the amended rule is in effect, the public benefit will be that registered accessibility specialists will have a reasonable

opportunity to comply with continuing education requirements so that those requirements do not unduly interfere with the services that registrants provide to the Department and the public.

Mr. Kuntz has determined that there will be no adverse economic effect on small or micro-businesses as a result of the proposed amendment; therefore, preparation of an economic impact statement and a regulatory flexibility analysis is not required. There are no anticipated economic costs to persons who are required to comply with the proposed amendments.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Government Code, Chapter 469 and Texas Occupations Code, Chapter 51, which authorize the Department to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. In particular, the rule implements Texas Occupations Code, §51.405.

The statutory provisions affected by the proposal are those set forth in Texas Government Code, Chapter 469 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

§68.74. Continuing Education.

(a) - (h) (No change.)

(i) This section shall apply to certificates of registration, issued under §469.201 of the Act, that expire on or after March 1, 2009 [~~March 1, 2008~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800068
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-7348

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CHAPTER 75. AIR CONDITIONING AND REFRIGERATION

16 TAC §75.80

The Texas Department of Licensing and Regulation ("Department") proposes amendments to 16 Texas Administrative Code, Chapter 75, §75.80, regarding the Air Conditioning and Refrigeration program application fees for initial and renewal contractor licenses.

The amendments to §75.80 propose to lower the application fee for an initial contractor license from $130 to $115 and to lower the application fee for a renewal contractor license from $80 to $65. The amendments also clarify that the license fees are applicable to contractors, since §75.80 was previously amended to include registration fees for air conditioning and refrigeration technicians and persons purchasing and using refrigerants.

The Department is required to set fees in amounts reasonable and necessary to cover the costs of administering the programs under its jurisdiction. Pursuant to the Department's annual fee review, the fees currently in place are above the amount required by the Department to cover costs. The decrease in fees would not adversely affect the administration and enforcement of the Air Conditioning and Refrigeration Program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments are in effect, the public benefit will be lower fees for annual license applications and renewals.

The anticipated economic effect on small or micro-businesses or to persons who are required to comply with the rule as amended will be lower fees for annual license applications and renewals. There will be no additional costs to small or micro-businesses or to persons who may be required to comply with the section as proposed. Since the agency has determined that the rule will have no adverse economic effect on small businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Chapter 1302 and Chapter 51, which authorizes the Department's governing body, the Texas Commission of Licensing and Regulation, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 1302 and Chapter 51. No other statutes, articles, or codes are affected by the proposal.

§75.80. Fees.

(a) Non-refundable contractor license application fee is $115 [~~$130~~].

(b) Contractor examination [~~Examination~~] fee is $90 for each examination requested.

(c) Contractor license renewal [~~Renewal~~] application fee is $65 [~~$80~~].

(d) Issuance of a revised or duplicate license or certificate is $25.

(e) An endorsement to an existing contractor license is $25.

(f) Certificate of Registration application fee for persons involved in the sale and use of refrigerants is $25.

(g) Technician registration and registration renewal fee is $20.

(h) Technician certification fee is $15.

(i) Late renewal fees for licenses and registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800069
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-7348

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 73. LICENSES AND RENEWALS

22 TAC §73.3, §73.7

The Texas Board of Chiropractic Examiners (Board) proposes amendments to §73.3, relating to continuing education, and §73.7, relating to approved continuing education courses. The proposed amendments describe specific continuing education requirements and make additional editorial changes to these rules.

Under the proposed amendment to §73.3, paragraph (b)(2) would be amended to require that four of the required 16 hours of continuing education shall consist of required courses. A minimum of two hours will consist of an ethics course specific to the practice of chiropractic. A minimum of one hour will consist of recordkeeping, documentation, and coding relevant to the practice of chiropractic in Texas. A minimum of one hour will relate to risk management relating to the Chiropractic Act, the board's rules, and other law relevant to the practice of chiropractic in Texas. Such risk management courses will include identification, investigation, analysis, and evaluation of risks and the selection of the most advantageous method of correcting, reducing, or eliminating, identifiable risks. The existing language of paragraph (b)(2) will be divided into new subparagraphs.

The existing language of §73.3(b)(4), relating to locations for continuing education presented by the board, will be deleted and the remaining paragraphs will be renumbered. Similarly, the related language under §73.7(k) will be deleted. This language is now obsolete.

The provisions of the current §73.3(b)(5), proposed (b)(4), would be amended to clarify that the letter confirming the illness or disability must be submitted by a doctor of chiropractic, medicine, or osteopathy.

The proposed amendments to §73.7 would include amending paragraph (g)(2) to include the conjunctive "and" and to amend paragraph (g)(3) to include recordkeeping, documentation, and coding and a reference to topics identified by the board as provided under §73.3(b)(2) as part of the list of continuing education topics.

In order to better coordinate the implementation of these proposed amendments and to ensure that licensees are informed of these revised continuing education requirements, the Board is proposing that revised continuing education requirements will not be implemented before July 2009.

Glenn Parker, Executive Director, has determined that for the first five-year period these amended rules are in effect there will be no additional costs to state or local governments as a result of enforcing or administering this rule. There will be no costs or adverse economic effects to small or micro businesses as the proposed amendments do not change the number of continuing education hours that must be obtained each year.

The Board has approximately 5,000 doctor of chiropractic licensees and nearly all of the licensees practice in facilities that are small businesses and many of them are micro-businesses. As the Executive Director has determined that there will not be an adverse economic effect as the result of these proposed amendments, no economic impact statement regulatory flexibility analysis is required.

Mr. Parker has also determined that for each year of the first five-year period these amended rules are in effect the public benefit will be greater awareness by practicing Texas doctors of chiropractic of the statutes and rules governing the practice of chiropractic, better awareness of ethical issues in chiropractic practice, and an increased awareness of proper recordkeeping, documentation and coding relevant to the practice of chiropractic in Texas.

Comments on the proposed amendments may be submitted to Ms. Mary Feys, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 3-825, Austin, Texas 78701 or via e-mail to mary.feys@tbce.state.tx.us or via facsimile to (512) 305-6705 no later than 30 days from the date that these proposed amendments are published in the *Texas Register*.

These amendments are proposed under Texas Occupations Code §201.152, relating to rules, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic and §201.356 relating to continuing education which requires the Board to adopt rules concerning continuing education and allows the Board to require licensees to attend continuing education classes specified by the Board.

§73.3. Continuing Education.

(a) Condition of Renewal. A licensee is required to attend continuing education courses as a condition of renewal of a license.

(b) Requirements.

(1) Every licensee shall attend and complete 16 hours of continuing education each year unless a licensee is exempted under subsection (d) of this section. Each licensee's reporting year shall begin on the first day of the month in which his or her birthday occurs.

(2) The 16 hours of continuing education may be completed at any course or [~~of~~] seminar elected by the licensee, which has been approved under §73.7 of this title (relating to Approved Continuing Education Courses).

(A) A [~~However, a~~] licensee must attend any course designated as a "TBCE Required Course," and the course may be counted as part of the 16 hour requirement. Effective with all doctor of Chiropractic licenses renewed on or after July 1, 2009, a minimum of four of the 16 required hours of continuing education shall include topics designated by the board.

(i) A minimum of two hours of the total required continuing education shall consist of an ethics course specifically related to the practice of chiropractic. In addition to the requirements in §73.7 of this title, an instructor for this continuing education must have a doctorate degree and must either have a license to practice chiropractic or law in the State of Texas or be part of the full-time faculty of a chiropractic college accredited by the Council of Chiropractic Education. This continuing education may not be taken online except as provided under paragraph (4) of this subsection.

(ii) A minimum of one hour of the total required continuing education shall relate to risk management relating to the Chiropractic Act, the board's rules, and other laws relevant to the practice of chiropractic in Texas. For the purpose of this rule, risk management refers to the identification, investigation, analysis, and evaluation of risks and the selection of the most advantageous method of correcting, reducing, or eliminating, identifiable risks. In addition to the requirements in §73.7 of this title, a risk management instructor shall have a doctorate degree and must either have a license to practice chiropractic or law in the State of Texas or be part of the full-time faculty of a chiropractic college accredited by the Council of Chiropractic Education. This continuing education may be taken online through a course offered by the board.

(iii) A minimum of one hour of the total required continuing education shall consist of recordkeeping, documentation, and coding relevant to the practice of chiropractic in Texas. In addition to the requirements in §73.7 of this title, a risk management instructor shall have a doctorate degree and must either have a license to practice chiropractic or law in the State of Texas or be part of the full-time faculty of a chiropractic college accredited by the Council of Chiropractic Education. This continuing education may not be taken online except as provided under paragraph (4) of this subsection.

(iv) In addition, from time to time, the board may issue public memoranda regarding urgent or significant public health issues that licensees need to be aware of. The board will publish such memoranda on the board's web site and distribute the memoranda to the major continuing education providers.

(B) A licensee who serves as an examiner for the National Board of Chiropractic Examiners' Part IV Examination may receive credit for this activity, not to exceed eight (8) hours each year.

(C) No more than six hours or credit may be obtained through online courses.

(3) A list of approved courses, including TBCE Required Courses, is available on the board's website, www.tbce.state.tx.us, as provided in §73.7(f) of this title. The board will also provide notice of a TBCE Course in its newsletter.

~~[(4) Two hours of continuing education to be presented by the board may be given at the following venues/locations:]~~

~~[(A) Texas Chiropractic Association - Midwinter;]~~

~~[(B) Texas Chiropractic Association Convention;]~~

~~[(C) Chiropractic Society of Texas Annual Convention;]~~

~~[(D) Parker College of Chiropractic Homecoming;]~~

~~[(E) Texas Chiropractic College Homecoming;]~~

~~[(F) Online at www.tbce.state.tx.us;]~~

~~[(G) TBCE Headquarters in Austin, TX (check website for details)]~~

(4) [~~(5)~~] A licensee who is unable to travel for the purpose of attending a continuing education course or seminar due to a mental or physical illness or disability may satisfy the board's continuing education requirements by completing 16 hours of approved continuing education courses online. Video courses will no longer qualify for credit.

(A) If the licensee is unable to take an online course, the licensee must submit a request for special accommodations to complete their continuing education requirements.

(B) In order for an online course to be accepted by the board, a licensee must submit a letter from a licensed doctor of chiropractic, medicine, or osteopathy who is not associated with the licensee in any manner. In the letter, the doctor must state the nature of the illness or disability and certify that the licensee was ill or disabled, and unable to travel for the purpose of obtaining continuing education hours due to the illness or disability.

(C) A licensee is required to submit a new certificate for each year an exemption is sought. An untrue certification submitted to the board shall subject the licensee to disciplinary action as authorized by the Chiropractic Act, Occupations Code §201.501 and §201.502.

(D) The six hour limit provided in subsection (b)(2) of this section for online courses does not apply to a licensee who submits a certification under this subsection.

(c) Verification.

(1) At the request of the Board, a licensee shall submit, to the board, written verification from each sponsor, of the licensee's attendance at and completion of each continuing education course which is used in the fulfillment of the required hours for all years requested.

(2) A licensee submitting hours as a National Boards examiner must submit written verification of the licensee's participation from the National Boards, on National Boards letterhead. The verification must include the licensee's name, board license number, and the date, time, and place of each examination attended by the licensee as an examiner.

(3) Failure to submit verification as required by paragraph (1) of this subsection shall be considered the same as failing to meet the continuing education requirements of subsection (b) of this section.

(d) Qualifying exemption. The following persons are exempt from the requirements of subsection (b) of this section:

(1) a licensee who holds an inactive Texas license. However, if at any time during the reporting year for which such exemption applies such person desires to practice chiropractic, such person shall not be entitled to practice chiropractic in Texas until all required hours of continuing education credits are obtained and the executive director has been notified of completion of such continuing education requirements;

(2) a licensee who served in the regular armed forces of the United States during part of the 12 months immediately preceding the annual license renewal date;

(3) a licensee who submits proof satisfactory to the board that the licensee suffered a mental or physical illness or disability which prevented the licensee from complying with the requirements of this section during the 12 months immediately preceding the annual license renewal date; or

(4) a licensee who is first licensed within the 12 months immediately preceding the annual renewal date.

§73.7. Approved Continuing Education Courses.

(a) Approved sponsors. The board will approve courses sponsored only by a chiropractic college fully credited through the Council on Chiropractic Education or a statewide, national or international professional association, upon application to the board on a form prescribed by the board. Application forms are available from the board.

(b) Application. A separate application must be submitted for each course and must include the course title, subject and description, the number of credit hours, the date, time and location of the course, and the names and backgrounds of speakers or instructors, the method of instruction, the name, address and telephone number of the course coordinator, and the signature of an authorized representative of the sponsor. Each continuing education course shall be approved for one calendar year only. The number of hours of credit to be earned at a course may not be changed after an application has been submitted to the board.

(c) Application deadline and fee. A sponsor may submit an application no later than 60 days prior to the date of the course, along with a nonrefundable application fee of $25 for each course. For the purpose of this subsection, where the same course is held in multiple cities or towns, with different speakers, each location is considered a separate course. If a continuing education program consists of separate sessions or modules, on different topics and on different dates, each session or module is considered a separate course.

(d) A sponsor shall certify on the application that:

(1) all course offered by the sponsor for which board approval is requested will comply with the criteria in this section; and

(2) the sponsor will be responsible for verifying attendance at each course and will provide a certificate of attendance as set forth in subsection (i) of this section.

(e) Rejection. The board will notify, in writing, a sponsor of any rejection.

(f) Approved list of courses. The board will maintain a list of approved courses on their website at www.tbce.state.tx.us for compliance with §73.3 of this title (relating to Continuing Education).

(g) Criteria for continuing education courses. In order for the board to approve a course, the course must:

(1) be presented by one or more speakers or instructors who demonstrate, through a vitae or resume, knowledge, training and expertise in the topic to be covered;

(2) have significant educational or practical content to maintain appropriate levels of competency; and

(3) be on a topic from one or more of the following categories:

(A) general or spinal anatomy;

(B) neuro-muscular-skeletal diagnosis;

(C) radiology or radiographic interpretation;

(D) pathology;

(E) public health;

(F) chiropractic adjusting techniques;

(G) chiropractic philosophy;

(H) risk management;

(I) physiology;

(J) microbiology;

(K) hygiene and sanitation;

(L) biochemistry;

(M) neurology;

(N) orthopedics;

(O) jurisprudence;

(P) nutrition;

(Q) adjunctive or supportive therapy;

(R) boundary (sexual) issues;

(S) insurance reporting procedures;

(T) chiropractic research;

(U) HIV prevention and education;

(V) acupuncture;

(W) Ethics; or

(X) recordkeeping, documentation, and coding.

(Y) other public health issues identified by the board as provided under §73.3(b)(2)(A)(iv) of this title.

(h) The board will not approve any course on practice management or accept credit for such course in satisfaction of the board's continuing education requirement for licensees.

(i) Sponsor responsibilities. A sponsor of an approved course shall:

(1) notify the board in writing prior to any change in course location, date, or cancellation;

(2) provide a roster of participants who attend the course which contains, at a minimum, each participant's name and current license number if a chiropractor, course number, and number of hours earned by each participant. This roster shall be submitted to the Board no later than 30 days after course completion;

(3) provide each participant in a course with a certificate of attendance. The certificate shall contain the name of the sponsor, the name of the participant, the title of the course, the date and place of the course, the amount and type of credit earned, the course number and the signature of the sponsor's authorized representative;

(4) assure that no licensee receives continuing education credit for time not actually spent attending the course. If any participant's absence exceeds ten minutes during any one hour period, credit for that hour shall be forfeited and noted in the sponsor's attendance roster that is submitted to the Board. Furthermore, the sponsor is responsible for seeing that each person in attendance is in place at the start of each course period;

(5) provide the activity rosters and any other additional information about a course to the board upon request;

(6) shall use the course title listed on the sponsor's application, and approved by the board, to advertise the course; and

(7) retain for a period of three years, for each approved course, documentation of compliance with this section, including:

(A) the curriculum presented;

(B) the names and vitae for each speaker;

(C) the attendance roles; and

(D) credit hours earned.

(j) The board may evaluate an approved sponsor or course at any time to ensure compliance with the requirement of this section. Upon the failure of a sponsor or course to comply with the requirements of this section, the board, at its discretion, may revoke the sponsor or the course's approved status.

~~[(k) The board, at its discretion, may authorize the presentation of a board required course at the annual seminars listed in § 73.3 of this title (relating to Continuing Education). The board will approve the subject, content and presenter of the course. Such course generally will cover topics of timely and educational interest to the chiropractic profession. The sponsor of a seminar shall designate the course as board required on its seminar agenda and other materials as follows: "TBCE Required Course." This designation may only be used for a course for which the sponsor has received written notice from the executive director that the board has approved the course for such designation.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800067
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 305-6901

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CHAPTER 75. RULES OF PRACTICE

22 TAC §75.7

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §75.7 (Required Fees and Charges) to adopt two new fees: a new $750 fee for an application for the recognition of a chiropractic specialty and an annual $8 fee for a newsletter to be sent to licensees. The Board also proposes to update the graphic contained in §75.7(a), which lists agency fees, with the only fee changes being the addition of the two new fees referenced above.

The action is proposed to cover the costs associated with reviewing applications for the recognition of chiropractic specialties as recently adopted in §71.13 and to cover the costs associated with producing and mailing a newsletter to be sent primarily to licensees of the Board.

The Board considered whether it could provide these services without the adoption of additional fees but determined that the fees are necessary for the Board to cover its costs as required by the Texas Legislature. The Board also considered publishing a newsletter in electronic form only but determined that an electronic only version would also have costs to produce and would not reach a sufficient number of licensees.

Glenn Parker, Executive Director, has determined that for the first five-year period the amended rule is in effect there will be no fiscal impact for local government as a result of enforcing or administering the rule. There will be no costs to the general public. There will be no costs to small or micro-businesses other than to licensees of the Board or to professional groups that wish to apply for the recognition of a chiropractic specialty.

Mr. Parker has determined that the financial impact on state revenues or expenditures will be an increase of approximately $36,000 to $40,000 per fiscal year in both revenues and expenditures for each fiscal year the fees are in effect.

Mr. Parker has determined that, for the first five-year period the amended rule is in effect, the public benefit of the fees will be to allow the Board to recover costs associated with reviewing applications for the recognition of chiropractic specialties and producing a newsletter. The recognition of valid chiropractic specialties will allow the public to better evaluate the qualifications of certain doctors of chiropractic in Texas. The newsletter will allow doctors of chiropractic in Texas to be better informed on current statutes and rules under which they practice and to be better aware of regulatory issues of concern to the Board and its licensees.

Comments on the proposed amendments may be submitted to Ms. Mary Feys, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 3-825, Austin, Texas 78701 or via e-mail to mary.feys@tbce.state.tx.us or via facsimile to (512) 305-6705 no later than 30 days from the date that these proposed amendments are published in the *Texas Register.*

The amendments are proposed under Texas Occupations Code §201.152, relating to rules, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic and §201.356 relating to continuing education which requires the Board to adopt rules concerning continuing education and allows the Board to require licensees to attend continuing education classes specified by the Board.

No other code, article, or statute is affected by the proposed amendment.

§75.7. Required Fees and Changes.

(a) Current fees required by the board are as follows:

Figure: 22 TAC §75.7(a)

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800064
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 305-6901

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PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 104. CONTINUING EDUCATION

22 TAC §104.1

The Texas State Board of Dental Examiners (Board) proposes amendments to §104.1, concerning Continuing Education Requirements. The amendment allows active Board members who serve as Examiners for the Western Regional Examining Board (WREB) to earn up to six hours of continuing education credit per year from WREB's calibration and standardization exercise. Additionally, the rule allows licensees who reside outside the United States to complete their continuing education requirements through self-study, allows licensees to count some risk-

management continuing education towards their annual hours required for licensure, allows licensees to count up to six hours of self-study towards their annual hours, and prohibits licensees from counting finance coursework towards the annual hours required for licensure. Some paragraphs were re-ordered for clarification and ease of reference.

Sherri Sanders Meek, Executive Director, has determined that for each year of the first five-years the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

The administration and enforcement of the amended section is expected to benefit the public by ensuring that practicing dentists have received the appropriate level and type of training and continuing education to meet the current standard of care in the practice of dentistry.

There is no anticipated impact on large, small or micro-businesses.

There is no anticipated economic cost to persons as a result of enforcing or administering the amended section.

Comments on the proposal may be submitted to Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that the proposal is published in the *Texas Register*.

This amendments are proposed under Texas Government Code, §§2001.021, et seq., Texas Civil Statutes; and the Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed amendments affect Title 3, Subtitle D of the Texas Occupations Code and Title 22, Chapter 101 - 125 of the Texas Administrative Code.

§104.1. Requirement.

As a prerequisite to the annual renewal of a dental or dental hygiene license, proof of completion of 12 hours of acceptable continuing education is required.

(1) Each licensee shall select and participate in the continuing education courses endorsed by the providers identified in §104.2 of this title (relating to [~~Continuing Education~~] Providers). A licensee, other than a licensee who resides outside of the United States, who is unable to meet education course requirements may request that alternative courses or procedures be approved by the Licensing [~~Continuing Education~~] Committee.

(A) Such requests must be in writing and submitted to and approved by the Licensing [~~Continuing Education~~] Committee prior to the expiration of the annual period for which the alternative is being requested.

(B) A licensee must provide supporting documentation detailing the reason why the continuing education requirements set forth in this section cannot be met and must submit a proposal for alternative education procedures.

(C) Acceptable causes may include [~~residence outside the United States,~~] unanticipated financial or medical hardships[~~,~~] or other extraordinary circumstances that are documented.

(D) A licensee who resides outside of the United States may, without prior approval of the Licensing Committee, complete all required hours of coursework by self-study.

(i) These self-study hours must be provided by those entities cited in §104.2 of this title. Examples of self-study courses include correspondence courses, video courses, audio courses, and reading courses.

(ii) Upon being audited for continuing education compliance, a licensee who submits self-study hours under this subsection must be able to demonstrate residence outside of the United States for all periods of time for which self-study hours were submitted.

(E) Should a request to the Licensing Committee be denied, the licensee must complete the requirements of this section.

[~~(D) Should the request be denied, the licensee must complete the requirements of this section.~~]

(2) Effective September 1, 2008, the following conditions and restrictions shall apply to coursework submitted for renewal purposes:

(A) At least 8 hours of coursework must be either technical or scientific as related to clinical care. The terms "technical" and "scientific" as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.

(B) Up to 4 hours of coursework may be in risk-management courses. Acceptable "risk management" courses include courses in risk management, record-keeping, and ethics.

(C) Up to 6 hours of coursework may be self-study. These self-study hours must be provided by those entities cited in §104.2 of this title. Examples of self-study courses include correspondence courses, video courses, audio courses, and reading courses.

(D) Hours of coursework in the standards of the Occupational Safety and Health Administration (OSHA) or in cardiopulmonary resuscitation (CPR) may not be considered in the 12-hour requirement.

(E) Hours of coursework in practice finance may not be considered in the 12-hour requirement.

[~~(2) Aside from courses taken to satisfy the jurisprudence requirement of §104.1(3) of this title, all coursework must be either technical or scientific as related to clinical care. The terms "technical" and "scientific" as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.~~]

(3) - (4) (No change.)

(5) Examiners for the Western Regional Examining Board (WREB) will be allowed credit for no more than 6 hours annually, obtained from WREB's calibration and standardization exercise.

(6) Any individual or entity may petition one of the providers listed in §104.2 of this title to offer continuing education.

(7) Providers cited in §104.2 of this title will approve individual courses and/or instructors.

(8) A consultant for the SBDE who is also a licensee of the SBDE is eligible to receive up to 6 hours of continuing education credit annually to apply towards the annual renewal continuing education requirement under this section.

(A) Continuing education credit hours shall be awarded for the issuance of an expert opinion based upon the review of SBDE cases and for providing assistance to the SBDE in the investigation and prosecution of cases involving violations of the Dental Practice Act and/or the Rules of the SBDE.

(B) The amount of continuing education credit hours to be granted for each consultant task performed shall be determined by the Executive Director, Division Director or manager that authorizes the consultant task to be performed. The award of continuing education credit shall be confirmed in writing and based upon a reasonable assessment of the time required to complete the task.

~~[(5) Hours of coursework in the standards of the Occupational Safety and Health Administration (OSHA) or in cardiopulmonary resuscitation (CPR) may not be considered in the 12-hour requirement.]~~

~~[(6) No more than 4 hours in any accumulation of coursework submitted for renewal purposes may be in self-study. These self-study hours must be provided by those entities cited in §104.2 of this title (relating to Providers). Examples of self-study courses include correspondence courses, video courses, audio courses, and reading courses.]~~

~~[(7) No more than 4 hours in any accumulation of coursework submitted for renewal purposes may be interactive computerized courses. These interactive computerized courses must be provided by those entities cited in §104.2 of this title. Examples of interactive computer courses include those that involve interactive dialogue through electronic linkage with an instructor in which manipulation of text or data by the licensee occurs.]~~

~~[(8) Examiners for the Western Regional Examining Board (WREB) will be allowed credit for no more than 6 hours annually, obtained from WREB's calibration and standardization exercise. This provision shall not apply to active board members.]~~

~~[(9) Any individual or entity may petition one of the providers listed in §104.2 of this title to offer continuing education.]~~

~~[(10) Providers cited in §104.2 of this title will approve individual courses and/or instructors.]~~

~~[(11) A consultant for the SBDE who is also a licensee of the SBDE is eligible to receive up to 6 hours of continuing education credit annually to apply towards the annual renewal continuing education requirement under this section.]~~

~~[(A) Continuing education credit hours shall be awarded for the issuance of an expert opinion based upon the review of SBDE cases and for providing assistance to the SBDE in the investigation and prosecution of cases involving violations of the Dental Practice Act and/or the Rules of the SBDE.]~~

~~[(B) The amount of continuing education credit hours to be granted for each consultant task performed shall be determined by the Executive Director, Division Director or manager that authorizes the consultant task to be performed. The award of continuing education credit shall be confirmed in writing and based upon a reasonable assessment of the time required to complete the task.]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 2, 2008.

TRD-200800001

Sherri Sanders Meek
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 475-0972

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PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.24

The Texas Appraiser Licensing and Certification Board proposes amendments to §153.24, relating to processing a complaint. The amendments are being made to clarify the procedures incident to processing and investigating complaints filed with the Texas Appraiser Licensing and Certification Board.

Troy Beaulieu, Attorney for the Texas Appraiser Licensing and Certification Board, has determined that for the first five-year period the amended section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the section. There is no anticipated impact on local or state employment as a result of implementing the amended section.

Mr. Beaulieu also has determined that for each year of the first five years the amendments are in effect, the anticipated public benefit as a result of these amendments is that consumers will have a clearly articulated and well defined outline of the processes that occur upon the filing of a complaint with this agency, as well as the disciplinary consequences associated with different types of violations. There will be no effect on small businesses. There is no anticipated cost to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Troy Beaulieu, Attorney for the Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under the Texas Appraiser Licensing and Certification Act, Subchapter D, Board Powers and Duties (Texas Occupations Code, Chapter 1103), which provides the board with authority to adopt rules under §1103.151, Rules Relating to Certification and Licenses and §1103.154, Rules Relating to Professional Conduct.

No other code, article, or statute is affected by this proposal.

§153.24. Processing a Complaint.

(a) - (d) (No change.)

(e) Pursuant to TEX. OCC. CODE §1103.101(b) the Commissioner is delegated those responsibilities with respect to the enforcement processes of the Board set forth in this chapter.

(f) A complaint must be in writing and must be signed by the complainant. The staff may initiate a complaint.

(g) Upon receipt of a complaint, the staff will:

(1) Send written acknowledgement of receipt to the complainant;

(2) Assign the complaint a case number and enter it onto a complaint tracking system which shall provide all necessary documentation to assure tracking of the handling and disposition of the complaint and the reporting of accurate and verifiable performance measures results;

(3) Make a preliminary determination whether the complaint is within the Board's jurisdiction and, if it is not, initiate the necessary correspondence to advise the complainant and dismiss the case for lack of jurisdiction; if there is jurisdiction the staff will continue as follows:

(A) Review the case and, as deemed necessary and appropriate, recommend to the Commissioner that the matter be investigated covertly. If it is not lawful and appropriate to conduct a covert investigation, the staff will continue as follows;

(B) If the complaint involves appraisal activity, transmit a letter to the person who is the subject of the complaint, referred to herein as the "respondent," requiring a response meeting the below-listed criteria:

(i) The respondent shall, within fourteen (14) calendar days, send a signed letter transmitting a narrative response to the complaint, addressing each and every element thereof and including numbered references to support in the respondent's work file which is to be marked with corresponding tabs. The fourteen (14) day period may be extended for good cause. Any request for extension must be in writing. Email is acceptable. The letter transmitting the response must contain the following statement: EXCEPT AS SPECIFICALLY SET FORTH HEREIN THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORKFILE, AND NOTHING HAS BEEN ADDED TO OR REMOVED FROM THIS WORKFILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE. (LIST ANY EXCEPTIONS AND IDENTIFY THEM IN THE WORKFILE AS EXCEPTIONS, USING CORRESPONDING TABS.)

(ii) The response may also address other matters not raised in the complaint that the respondent believes likely to be raised by the staff and may be supported by documentation contained in the work file, appropriately identified and tabbed.

(iii) Any supporting documentation that is provided that was not in the work file must be conspicuously labeled as such and kept separate from the work file.

(iv) The response must provide a list of any and all persons known to the respondent to have actual knowledge of any of the matters made the subject of the complaint and, if in the respondent's possession, contact information.

(4) Staff shall review the response, including all supporting materials provided and, no later than 60 days after receipt, contact the respondent to discuss the matter. In this discussion, which may be in person or by telephone, the assigned staff person conducting the investigation will advise the respondent as to:

(A) Their preliminary views, based on a review of the complaint, the response, and all supporting documentation provided, as to the merits of the complaint;

(B) Their preliminary views as to any other violations of the Act, the Rules, or USPAP identified in this review process; and

(C) Unless they believe that additional investigative work is warranted, what they would view as an appropriate resolution.

(5) Following this conversation, if the respondent believes that a face-to-face meeting to discuss the matter further would facilitate resolution, the staff person may agree to such a meeting.

(6) Any general agreement in principle as to resolution may be reduced to a proposed form of consent order or consent agreement and, if the staff attorney and the Commissioner concur, may be presented to the Board for approval, denial, or a request for changes and re-presentation.

(7) If agreement as to resolution cannot be reached, the staff shall proceed with any necessary investigation and the preparation and prosecution of a contested case before the State Office of Administrative Hearings subject to TEX. GOV'T. CODE, Chapter 2001 and TEX. OCC. CODE, Chapter 1103.

(h) In determining the proper disposition of a complaint, staff shall follow the following guidelines:
Figure: 22 TAC §153.24(h)

(1) In addition to the recommended actions provided for above, staff may recommend any or all of the following:

(A) Reducing or increasing the recommended penalty based on documented factors that support the deviation;

(B) Probating all or a portion of a sanction or administrative penalty for a period not to exceed five (5) years;

(C) Requiring additional reporting requirements; and/or

(D) Such other recommendations, with documented support, as will achieve the purposes of the Act, the Rules, and/or USPAP.

(2) Any and all administrative sanctions provided for above are in addition to an agreement or order to comply fully with applicable laws, rules, and regulations.

(3) If after a review of the file and completion of any investigation deemed necessary, the staff concludes that no regulatory purposes would be served by further action, it shall recommend to the Board that the complaint be dismissed without further action.

(i) Whenever staff becomes aware of facts or circumstances that indicate a reasonable likelihood that mortgage fraud may have been committed with the involvement or participation of a licensee, staff will coordinate the handling of that matter in accordance with applicable laws and rules, including the rules of the Mortgage Fraud Task Force under the auspices of the Office of the Attorney General, and make any appropriate referrals and/or reports to prosecutorial authorities or other oversight authorities.

(j) All final orders must be approved by the Board.

(k) The reviews and investigations provided for in these rules are of a regulatory nature and do not constitute engaging in appraisal activity subject to USPAP. With the Commissioner's or the Board's prior approval, staff may perform or engage others to perform appraisal activity for the Board as needed to carry out an effective regulatory oversight and enforcement program.

(l) A Peer Investigative Committee that has been appointed in accordance with TEX. OCC. CODE §1103.453 and it shall receive such compiled complaint files as the Chair may refer to them, review them, and make a report to staff as to:

(1) The general facts presented;

(2) Whether the allegations in the complaint are believed to be true or false and, if believed true, provide a statement as to which documents in the complaint file support that view;

(3) Whether the review indicated any other violations of USPAP that should be added to the complaint and, if so, a statement as to which documents in the complaint file support that view; and

(4) If it is believed that additional investigative work needs to be done, a statement as to what additional investigation is believed to be warranted.

(m) The foregoing processes are deemed to be a regulatory review and are not deemed to be appraisal activity. Staff may rely on the report as setting forth the findings of fact necessary to support any appropriate conclusions of law and determination as to an appropriate regulatory resolution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 2, 2008.

TRD-200800015
Troy Beaulieu
Attorney
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 465-3900

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PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

The Texas State Board of Examiners of Professional Counselors (board) proposes amendments to §§681.1 - 681.16, 681.31, 681.41 - 681.52, 681.71 - 681.73, 681.81 - 681.83, 681.91 - 681.93, 681.101, 681.103, 681.111 - 681.113, 681.121, 681.123 - 681.127, 681.141, 681.142, 681.144 - 681.147, 681.161, 681.162, 681.164 - 681.171, 681.181, 681.182, 681.184, 681.201 - 681.204, the repeal of §§681.102, 681.122, 681.143, and 681.183, and new §681.102, concerning the licensing and regulation of professional counselors.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 681.1 - 681.16, 681.31, 681.41 - 681.52, 681.71 - 681.73, 681.81 - 681.83, 681.91 - 681.93, 681.101 - 681.103, 681.111 - 681.113, 681.121 - 681.127, 681.141 - 681.147, 681.161, 681.162, 681.164 - 681.171, 681.181 - 681.184, 681.201 - 681.204 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist in that rules concerning the licensing and regulation of professional counselors are still needed; however, the rules will be amended and proposed with revisions as described in this preamble. The proposed repeals and amended sections are the result of the comprehensive rule review undertaken by the board and the board's staff.

In general, each section was reviewed and proposed for revisions in order to ensure appropriate subchapter, section, and paragraph organization; to ensure clarity; to improve spelling, grammar, and punctuation; to ensure that the rules reflect current legal and policy considerations; to ensure accuracy of legal citations; to eliminate unnecessary catch-titles; to eliminate the repetitive use of long titles for terms that have been assigned short titles by definition; to delete repetitive, obsolete, unenforceable, or unnecessary language; to improve draftsmanship; and to make the rules more accessible, understandable, and usable.

SECTION-BY-SECTION SUMMARY

In §681.2(6), the definition of "authorized representative" is deleted and redefined in §681.127. Section 681.2(7) - (14) is renumbered due to the deletion of §681.2(6). Section 681.2(8), Counseling-related field is amended so the term counseling and guidance can be in line with the degrees offered at universities in Texas and to add dance therapy as a non-counseling related degree.

Section 681.3 is amended for clarity.

Section 681.4 is amended to require the board to transact business only when a quorum is present.

Sections 681.5 - 681.9 are amended to reflect clarification and update of language.

Section 681.10 is amended to correct the name of the governing agency.

Section 681.11 is amended to revise reimbursement expenses.

Section 681.12 is amended for clarity.

Section 681.13 is amended to expand on non-discriminatory issues.

Section 681.14 amends the rule from biennial to two year for the inactive status fee for consistency throughout the rules.

Section 681.15(a) amends the time periods in which a license should be approved or denied. Section 681.15(c) and §681.16 reflect clarification and update of language.

Section 681.31(14) is edited to acknowledge that the list of expressive therapies is not inclusive.

In §681.41(e), the rule is edited to state that regardless of setting, the counseling treatment must be in the context of a professional relationship. Section 681.41(g) is edited to allow counseling by use of technological means of communication. Section 681.41(j) is edited to not allow a licensee to promote the licensee's personal business activities to the client. Section 681.41(k) is amended to separate a licensee setting professional boundaries with dual relationships. Section 681.41(l) is amended to clarify a dual relationship and when it could be considered detrimental to the client. In §681.41, subsections (l) - (z) are relettered for conformity. Section 681.41(m) is edited to require a licensee to request a release from the client in order to discuss the client with the other counselor when the licensee discovers that the client is seeing another counselor. Section 681.41(n) reflects clarification and update of language. Section 681.41(p) is proposed to clarify what type of records needs to be kept. Section 681.41(q) is amended to shorten the time period a licensee must maintain client files after the last contact with the client. Section 681.41(s)(4) is amended for clarity. Section 681.41(t) is amended and separated into two separate rules for clarity. Section 681.41(u) is added to require the licensee to facilitate the transfer of a client to appropriate

care upon termination of a relationship. Section 681.41(w) is amended for clarity. Section 681.41(x) is amended to require a licensee to report the unlicensed practice of counseling to the board. Section 681.41(y) is proposed to add that a licensee shall not participate in any way in the falsification for renewal of a license. Section 681.41(aa) is amended to clarify that the licensee should establish a plan of custody and control of the client's mental health record and the licensee should inform each new client of the plan.

Section 681.42(a) is edited to define the term Mental Health Service Provider. Section 681.42(b)(4) is amended to add that sexual contact can occur more than five years after the termination of the client relationship will not be deemed a violation if the conduct is consensual if certain conditions are met. Section 681.42(c) is deleted and included in §681.42(b). Section 681.42(c) - (g) is relettered for clarity. Section 681.42(g) amends the time period required to notify the board and prosecuting attorney of abuse of a client.

Section 681.43 and §681.44 reflect clarification and update of language.

Section 681.45(d)(1) corrects the title to Texas Family Code, Chapter 261.

Section 681.46(g) is amended for clarity and to state that disciplinary action may be taken if a complaint is filed in bad faith.

Section 681.47 is amended to remove the word allowable.

Section 681.48 in amended to remove the term third party.

Section 681.49 is amended to read the licensee shall clearly state the licensee's licensure status on all advertisements or announcements of counseling treatment interventions.

Section 681.50 is amended to change the term subject to participant.

Section 681.51(b) is added to allow the board discretion on issuing a license should the applicant have conduct prior to application that would be a violation of the code of ethics if the person was a licensee.

Section 681.52(a) is amended for clarity.

Section 681.71 removed the statement that "fees associated with the application process are not refundable."

Section 681.72(d) is amended to state hours without a supervisor agreement form on file with the board may not be accepted by the board. Section 681.72(f) is amended for clarity.

Section 681.73(d) is amended to state what exams are required for licensure.

Section 681.81(b) reflects clarification and update of language.

Section 681.82 is amended to remove the word "professional."

Section 681.83 reflects clarification and update of language.

Section 681.91(b) is amended to clarify the board is referring to the practice of counseling in this state. Section 681.91(c) is amended to add the word counseling to the rule. Section 681.91(e) is amended to specify the length of time an initial temporary license is valid. Section 681.91(f) is amended to no longer allow a 36-month extension but allow the intern to request a one-year extension from the board. Section 681.91(h)(2) is amended to specify the name of the required examination. Section 681.91(k) is added to explain what applicants coming from another state are required to submit to the board office for licensure.

Section 681.92(a) is amended for clarity. Section 681.92(b) is amended to state how many hours and intern can earn via technological means of communication. Section 681.92(c) amends the rule to require an "Intern" to gain the require hours and not an "applicant." Section 681.92(f) is deleted as obsolete. Section 681.92(g) is modified to allow 2 interns in a session to be considered individual supervision and three or more to be a group. Section 681.92, subsections (h) - (i) are relettered for clarity. Section 681.92(j) reflects clarification and update of language. Section 681.92(l) is deleted as unnecessary. Section 681.92(k) reflects clarification and update of language.

Section 681.93(d) is amended to reflect changes §681.83(g) concerning supervisor requirements. Section 681.93(e)(6) is added to require the supervisor to submit the supervised experience documentation form in a timely manner. Section 681.93(h) reflects clarification and update of language. Section 681.93(j) is added to allow for the supervisor status to be denied, revoked, or suspended.

New §681.102 concerns the notice of results for examinations.

Section 681.101 and §681.103 reflect clarification and update of language.

Section 681.111(a) is revised to clarify the term an initial license is issued for. Section 681.111(b) is revised to designate the board chair as the only signature on the regular and temporary license certificate. Section 681.111(c) is revised to remove the term art therapy specialty. Section 681.111(c) - (g) is relettered for conformity.

Section 681.112(a)(2) is revised to designate what is required for an applicant to submit for licensure to the board office. Section 681.112(a)(4) is deleted requiring an applicant for a provisional license to submit a letter of sponsorship from a regular license holder. Section 681.112(b) is deleted as unnecessary. Section 681.112(c) is deleted and reworded in §681.112(b). Section 681.112(b) and (e) reflects clarification and update of language. Section 681.112(c) reflect clarification and update of language.

Section 681.113 reflects clarification and update of language.

Section 681.121 amends the rule from biennial to two years for consistency throughout the rules.

Section 681.123(a) is amended to state that the board will send a renewal notice 30 days prior to expiration to the licensee last known address. Section 681.123(b) is amended to require the licensee to renew their license on time whether a renewal notice is received or not. Section 681.123(c) is amended to state that a license will not be renewed until all renewal information is received in the board office. Section 681.123(d) and (e) reflects clarification and update of language.

Section 681.124(b) is modified to allow the late renewal of a license with a penalty if the license is not renewed by the expiration date but within one year. Section 681.124(c) reflects clarification and update of language. Section 681.124(d) is amended to state that the continuing education must be submitted before the license will be renewed.

Section 681.125(e) is amended to require the Jurisprudence exam and continuing education earned while on inactive status. Section 681.125(f) is amended to clarify the date the inactive status will expire. Section 681.125(g) reflects clarification and

update of language Section 681.125(h) amends the rule from biennial to two years for consistency throughout the rules.

Section 681.126(c) reflects clarification and update of language. Section 681.126(d) is added to state that if a licensee request retired status while a complaint is pending, it will be treated as a surrender of the license.

Section 681.127(a) is amended to define "designated representative." Section 681.127(b)(1) is amended to state what the written request is required to contain. Section 681.127(b)(2) is deleted as unnecessary. Section 681.127(b)(2) - (6) is renumbered for conformity. Section 681.127(b)(2) - (6) changes "authorized" to "designated" to match §681.127(a).

Section 681.141(a) reflects clarification and update of language. Section 681.141(c) is amended to require 4 hours of ethics every two years with the Texas Jurisprudence exam counting as one hour of ethics. Section 681.141(e) is modified to state the Texas Jurisprudence exam is required each renewal period. Section 681.141(f) is added to require three hours of continuing education in supervision practices for all board approved supervisors as part of their 24 hours of continuing education each renewal period.

Section 681.142(a) - (b) reflect clarification and update of language. Section 681.142(c) is added to require that continuing education courses must be within the required contend areas or directly related to the continued development of the profession of counseling skills.

Section 681.144(a) is separated into two subsections (a) and (b) and modified for clarity. Section 681.144(b) is added as a separate rule from §681.144(a) for clarity. Section 681.144(c) - (i) is relettered based on the new subsection (b) and modified for clarity.

Section 681.145 is amended to reflect the two-year renewal cycle and 24 hours of continuing education requirement.

Section 681.146 reflects the changes to the way a licensee will report continuing education when selected for audit.

Section 681.147 reflects clarification and update of language.

Section 681.161(a) is amended to require a complaint to be filed in writing to the board office. Section 681.161(j) is amended to require the board to periodically send out pending status letters of open complaints. Section 681.161(k) is deleted as unnecessary.

Section 681.162(a) is amended to add administrative penalties to disciplinary actions. Section 681.162(b) and (c) is amended to remove requiring the notice to be mailed by certified mail.

Section 681.164 reflects clarification and update of language.

Section 681.165 revises the title of the rule.

Section 681.166 is amended to allow the Executive Director to set time limits for testimony during an informal conference and not require that the complainant or client be present during the informal conference. Section 681.166(f) is deleted stating the complainant may be informed of the informal conference. Section 681.166(f) - (v) is relettered for conformity. Section 681.166(f) is amended to require at least one member of the complaints committee to be present at the informal conference. Section 681.166(k) is amended to allow the complaints committee member or the executive director to exclude anyone from all or part of the informal conference.

Section 681.167(a) is amended for clarity. Section 681.167(b) is deleted as unnecessary.

Section 681.168(d), is modified to state that if a license is surrendered during the course of an investigation, the surrender is considered a final disciplinary action and may be considered for denial upon reapplication for licensure.

Section 681.169 is amended to modify the section title and reference the provisions of Senate Bill 228 (2007, 80th Legislature) relating to the denial of license renewal of a license holder who has failed to pay child support or failed to comply with the terms of an order providing for the possession of or access to a child in new subsection (i).

Section 681.170(b) is modified for clarity

Section 681.171(a) is modified to revise the title of the rule.

Section 681.181 is amended to remove the reference to Texas, as it is defined in §681.2(3) definitions, of this code.

Section 681.182(b) - (d) is amended to remove the reference to Texas, as it is defined in §681.2(3) definitions, of this code.

Section 681.183 is deleted as repetitive.

Section 681.184(b) is amended to refer to the board and not department for final orders.

Section 681.201 is amended to remove the reference to Texas, as it is defined in §681.2(3) definitions, of this code.

Section 681.202 reflect clarification and update of language

Section 681.203 title is changed for proper spelling.

Section 681.204 reflect clarification and update of language

Section 681.102, Grading; §681.122, Staggered Renewals; and §681.143 Process for Applying for Programs are repealed.

FISCAL NOTE

Bobbe Alexander, Executive Director, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed. There will be no decrease in general revenue each year of the first five years the sections are in effect.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Alexander has also determined that there will be no economic costs to small businesses or micro-businesses. This was determined by interpretation of the rules that these entities will not be required to alter their business practices to comply with the sections as proposed. The rules relate to individuals who are licensed as professional counselors, and there are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Alexander has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to effectively regulate the practice of counseling in Texas, which will protect and promote public health, safety, and welfare, and to ensure that statutory directives are carried out.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The board has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Bobbe Alexander, Executive Director, State Board of Examiners of Professional Counselors, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756 or by e-mail to lpc@dshs.state.tx.us. When e-mailing comments, please indicate "Comments on Proposed Rules" in the e-mail subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

SUBCHAPTER A. THE BOARD

22 TAC §§681.1 - 681.16

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.1. General.

This chapter implements [~~The purpose of this chapter is to implement~~] the provisions of Texas Occupations Code, Chapter 503 (the Licensed Professional Counselor Act), concerning the licensing and regulation of professional counselors.

§681.2. Definitions.

The following words and terms, as [~~when~~] used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) - (4) (No change.)

(5) Art therapy intern--An LPC or an LPC Intern [~~intern~~] holding a temporary license with an art therapy specialty designation.

[~~(6) Authorized representative--An individual authorized to act on behalf of a licensee as evidenced by a written power of attorney; or the licensee's spouse.~~]

(6) [~~(7)~~] Board--The Texas State Board of Examiners of Professional Counselors.

(7) [~~(8)~~] Client--A person who requests and receives counseling services from a licensee or who has engaged in a therapeutic relationship with a licensee.

(8) [~~(9)~~] Counseling-related field--A mental health discipline utilizing human development, psychotherapeutic, and mental health principles including, but not limited to, psychology, psychiatry, social work, marriage and family therapy, and counseling and guidance [~~guidance and counseling~~]. Non-counseling related fields include, but are not limited to, sociology, education, administration, dance therapy and theology.

(9) [~~(10)~~] Department--Department of State Health Services.

(10) [~~(11)~~] Health care professional--A licensee or any other person licensed, certified, or registered by the state in a health related profession.

(11) [~~(12)~~] License--A regular license, regular license with art therapy specialty designation, provisional license, or temporary license issued by the board.

(12) [~~(13)~~] Licensee--A person who holds a regular license, regular license with art therapy specialty designation, provisional license, or temporary license.

(13) [~~(14)~~] LPC Intern [~~intern~~]--A person who holds a temporary license to practice counseling.

(14) [~~(15)~~] Recognized religious practitioner--A rabbi, clergyman, or person of similar status who is a member in good standing of and accountable to a denomination, church, sect or religious organization legally recognized under the Internal Revenue Code, §501(c)(3) and other individuals participating with them in pastoral counseling if:

(A) the counseling activities are within the scope of the performance of their regular or specialized ministerial duties and are performed under the auspices of sponsorship of the legally recognized denomination, church, sect, religious organization or an integrated auxiliary of a church as defined in Federal Tax Regulations, 26 Code of Federal Regulations, §1.6033-2(g)(5)(I) (1982);

(B) the individual providing the service remains accountable to the established authority of that denomination, church, sect, religious organization or integrated auxiliary; and

(C) the person does not use the title of or hold himself or herself out as a professional counselor.

(15) [~~(16)~~] Supervisor--A person approved by the board as meeting the requirements set out in §681.93 of this title (relating to Supervisor Requirements), to supervise an LPC Intern [~~intern~~].

§681.3. Meetings.

(a) The board will [~~shall~~] hold at least two regular meetings and additional meetings as necessary during each fiscal year.

(b) The chair [~~chairperson~~] may call meetings after consultation with board members or by a majority of members so voting at a regular meeting.

(c) (No change.)

§681.4. Transaction of Official Business.

(a) The board shall [~~may~~] transact official business only when in a legally constituted meeting with a quorum present. A quorum of the board necessary to conduct official business is a majority of the members.

(b) - (c) (No change.)

§681.5. Agendas.

(a) The executive director is [~~shall be~~] responsible for preparing and submitting an agenda to each member of the board prior to each meeting which includes items requested by members, items required by law, and other matters of board business which have been approved for discussion by the chair [~~chairperson~~].

(b) (No change.)

§681.6. Minutes.

(a) The minutes of a board meeting are official only if [~~when~~] affixed with the original signatures of the chair [~~chairperson~~] and the executive director.

(b) - (c) (No change.)

§681.7. Elections.

(a) At the meeting held nearest to August 31 of each year, the board shall elect a vice-chair [~~vice-chairperson~~].

(b) A vacancy which occurs in the office of vice-chair [~~vice-chairperson~~] may be filled at any regular meeting as required.

§681.8. Officers.

(a) The chair [~~chairperson~~] shall preside at all meetings at which he or she is in attendance and perform all duties prescribed by law or this chapter.

(b) The chair [~~chairperson~~] is authorized by the board to make day-to-day minor decisions regarding board activities in order to facilitate the responsiveness and effectiveness of the board.

(c) The vice-chair [~~vice-chairperson~~] shall perform the duties of the chair [~~chairperson~~] in case of the absence or disability of the chair [~~chairperson~~].

(d) In case the office of the chair [~~chairperson~~] becomes vacant, the vice-chair [~~vice-chairperson~~] shall serve until a successor is appointed.

§681.9. Committees.

(a) The board or the chair [~~chairperson~~] may establish committees deemed necessary to carry out board responsibilities.

(b) The chair [~~chairperson~~] shall appoint members of the board to serve on committees and shall designate a chair [~~chairperson~~] for each committee.

(c) (No change.)

(d) Committee chairs [~~chairpersons~~] shall preside at all committee meetings and shall make regular reports to the board.

(e) (No change.)

(f) Committees shall meet when called by the committee chair [~~chairperson~~] or when so directed by the board.

(g) (No change.)

§681.10. Executive Director.

(a) The executive director of the board shall be an employee of the department appointed by the Commissioner of the Department of State Health Services [~~Health~~], with the advice and consent of the board.

(b) - (f) (No change.)

§681.11. Reimbursement for Expenses.

[~~(a)~~] A board member is entitled to per diem and transportation expenses as provided by the General Appropriations Act.

~~[(b) Payment to members of per diem and transportation expenses shall be on official state vouchers which have been approved by the executive director.]~~

§681.12. Official Records of the Board.

(a) (No change.)

(b) When a [~~any person's~~] request would be unreasonably disruptive to the ongoing business of the office or when the safety of any record is at issue, physical access by inspection may be denied and the requester will be provided the option of receiving duplicate copies at the requester's cost.

(c) Costs [~~Applicable costs~~] of duplication shall be paid by the requester at the time of or before the duplicated records are sent or given to the requester. The charge for copies shall be [~~the same as~~] set by the department [~~for copies~~].

(d) (No change.)

§681.13. Impartiality and Non-discrimination.

(a) The board shall make decisions in the discharge of its statutory authority without regard to any person's age, race, religion, ethnicity, [~~color,~~] sex, disability, national origin, or genetic information.

(b) (No change.)

(c) Applicants seeking accommodations under the Americans with Disabilities Act shall inform the board in advance and in writing of any special accommodations needed [~~in advance and in writing~~].

§681.14. Licensing Fees.

(a) Licensing fees are as follows:

(1) - (5) (No change.)

(6) 2-year [~~biennual~~] inactive status fee--$50;

(7) - (9) (No change.)

(b) - (f) (No change.)

§681.15. Processing Procedures.

(a) Time periods. The board shall comply with the following procedures in processing applications for a license and renewal of a regular license.

(1) (No change.)

(2) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial end on the day notice of the proposed decision is mailed to the applicant. The time periods are as follows:

(A) (No change.)

(B) initial letter of approval for a license - 30 [~~180~~] working days; and

(C) letter of denial of a license - 30 [~~180~~] working days.

(3) (No change.)

(b) (No change.)

(c) Appeal. If a request for reimbursement under subsection (b) of this section is denied by the executive director, the applicant may appeal to the chair [~~chairperson~~] of the board for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the chair [~~chairperson~~] at the address of the board that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The executive director shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The chair [~~chairperson~~] shall provide written notice of the chair's decision to the applicant and the executive director. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full

reimbursement of all fees paid in that particular application process shall be made.

(d) (No change.)

§681.16. Petition for the Adoption of a Rule.

(a) A [~~Any~~] person may petition the board to adopt a rule.

(b) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800070
Judy Powell
Chair
Texas State Board of Examiners of Professional Counselors
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER B. AUTHORIZED COUNSELING METHODS AND PRACTICES

22 TAC §681.31

STATUTORY AUTHORITY

The proposed amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rule implements Government Code, §2001.039.

The proposed amendment affects Occupations Code, Chapter 503.

§681.31. Counseling Methods and Practices.

The use of specific methods, techniques, or modalities within the practice of professional counseling is limited to professional counselors appropriately trained and competent in the use of such methods, techniques, or modalities. Authorized counseling methods techniques and modalities may include, but are not restricted to, the following:

(1) - (13) (No change.)

(14) expressive [~~therapies which utilize therapeutic~~] modalities utilized in the treatment of interpersonal, emotional or mental health issues, chemical dependency, or human developmental issues. Modalities include but are not limited to[~~,including, but not limited to~~], music [~~therapy~~], art [~~therapy~~], dance [~~or~~] movement [~~therapy, hippotherapy~~], or the use of [~~other~~] techniques employing animals in providing treatment [~~therapy as described previously~~];

(15) - (17) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800071
Judy Powell
Chair
Texas State Board of Examiners of Professional Counselors
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. CODE OF ETHICS

22 TAC §§681.41 - 681.52

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.41. General Ethical Requirements.

(a) - (d) (No change.)

(e) Regardless of setting, a licensee shall provide counseling treatment intervention only in the context of a professional relationship. A licensee shall inform an individual in writing before services are provided of the following:

(1) - (6) (No change.)

(f) (No change.)

(g) Where the client is in one location and the counselor is in another, technological means of communication may be used to facilitate the therapeutic counseling process.

[~~(g) A licensee shall provide counseling treatment intervention only in the context of a professional relationship. Interactive long distance counseling delivery, where the client resides in one location and the counselor in another may be used as part of the therapeutic counseling process. Counselors engaging in interactive long distance counseling must adhere to each provision of this chapter.~~]

(h) In accordance with the provisions of the Act, §503.401(a)(4), a [~~A~~] licensee shall not intentionally or knowingly offer to pay or agree to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, corporation, or entity for securing or soliciting clients or patronage for or from any health care professional.

[~~(1) In accordance with the provisions of the Act, §503.401(4), a licensee is subject to disciplinary action if the licensee directly or indirectly offers to pay or agrees to accept remuneration to or from any person for securing or soliciting a client or patronage.~~]

[~~(2)~~] A licensee employed or under contract with a chemical dependency facility or a mental health facility shall comply with the requirements in the Texas Health and Safety Code, §164.006, relating to soliciting and contracting with certain referral sources. Compliance with the Treatment Facilities Marketing Practices Act, Texas Health and Safety Code, Chapter 164, shall not be considered as a violation of state law relating to illegal remuneration.

(i) (No change.)

(j) A licensee shall not promote the licensee's personal or business activities to a client [~~unless the licensee informs the client of the licensee's personal or business interest in the activity~~].

(k) A licensee shall set and maintain professional boundaries. [~~Dual relationships with clients are prohibited. A dual relationship is considered any non-counseling activity initiated by either the licensee or client for the purpose of establishing a non-therapeutic relationship.~~]

[~~(1) The licensee shall not provide counseling services to previous or current:~~]

[(A) family members;]

[(B) personal friends;]

[(C) educational associates; or]

[(D) business associates.]

[(2) The licensee shall not give or accept a gift from a client or a relative of a client valued at more than fifty dollars, or borrow or lend money or items of value to clients or relatives of clients or accept payment in the form of goods or services rendered by a client or relative of a client.]

[(3) The licensee shall not enter into a non-professional relationship with a client, client's family member or any person having a personal or professional relationship with a client, if such a relationship could be detrimental to the client.]

(l) Dual relationships with clients are prohibited. A dual relationship is considered any non-counseling activity initiated by either the licensee or client for the purpose of establishing a non-therapeutic relationship. (See definition of CLIENT as referenced in §681.2(7) of this title (relating to Definitions).

(1) The licensee shall not provide counseling services to previous or current:

(A) family members;

(B) personal friends;

(C) educational associates; or

(D) business associates.

(2) The licensee shall not give or accept a gift from a client or a relative of a client valued at more than $50, or borrow or lend money or items of value to clients or relatives of clients or accept payment in the form of goods or services rendered by a client or relative of a client.

(3) The licensee shall not enter into a non-professional relationship with a client's family member or any person having a personal or professional relationship with a client, if the licensee knows or reasonably should have known such a relationship could be detrimental to the client.

(m) [(l)] The licensee shall not knowingly offer or provide counseling treatment intervention to an individual concurrently receiving counseling treatment intervention from another mental health services provider except with that provider's knowledge. If a licensee learns of such concurrent therapy, the licensee shall request release from the client to inform the other professional and strive to establish positive and collaborative professional relationships [take immediate and reasonable action to inform the other mental health services provider].

(n) [(m)] A licensee may take reasonable action to inform medical or law enforcement personnel if the licensee [professional] determines that there is a probability of imminent physical injury by the client to the client or others or there is a probability of immediate mental or emotional injury to the client.

(o) [(n)] In individual and group counseling settings, the licensee shall take reasonable precautions to protect individuals from physical or emotional harm resulting from interaction within a group or from individual counseling.

(p) [(o)] For each client, a licensee shall keep accurate records of the intake assessment, the dates of counseling treatment intervention, principal treatment methods, [types of counseling treatment intervention,] progress or case notes, [intake assessment,] treatment plan, and billing information.

(q) [(p)] Records held by a licensee shall be kept for a minimum of five years from the date of the last contact with the client. [seven years for adult clients and seven years beyond the age of 18 for minor clients.]

(r) [(q)] Records created by licensees during the scope of their employment by educational institutions; by federal, state, or local governmental agencies; or their political subdivisions or programs are not required to comply with subsections (p) [(o)] and (q) [(p)] of this section.

(s) [(r)] A licensee shall bill clients or third parties for only those services actually rendered or as agreed to by mutual understanding at the beginning of services or as later modified by mutual written agreement.

(1) Relationships between a licensee and any other person used by the licensee to provide services to a client shall be so reflected on billing documents.

(2) On the written request of a client, a client's guardian, or a client's parent (sole managing, joint managing or possessory conservator) if the client is a minor, a licensee shall provide, in plain language, a written explanation of the types of treatment and charges for counseling treatment intervention previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(3) A licensee may not knowingly [or flagrantly] overcharge a client.

(4) With the exception of an unkept appointment, a [A] licensee may not submit to a client or a third party payor a bill for counseling treatment intervention that the licensee knows was not provided or knows was improper, unreasonable, or [medically or clinically] unnecessary[, with the exception of an unkept appointment].

(t) [(s)] A licensee shall terminate a professional counseling relationship when it is reasonably clear that the client is not benefiting from the relationship. [When professional counseling is still indicated, the licensee shall take reasonable steps to facilitate the transfer to an appropriate referral or source.]

(u) Upon termination of a relationship if professional counseling is still necessary, the licensee shall take reasonable steps to facilitate the transfer to appropriate care.

(v) [(t)] A licensee shall not evaluate any individual's mental, emotional, or behavioral condition unless the licensee has personally interviewed the individual or the licensee discloses with the evaluation that the licensee has not personally interviewed the individual.

(w) [(u)] A licensee shall [may] not knowingly [persistently] over treat a client.

(x) [(v)] A licensee shall not aid or [and] abet the unlicensed practice of professional counseling by a person required to be licensed under the Act. A licensee shall report to the board knowledge of any unlicensed practice of counseling.

(y) [(w)] A licensee or an applicant for licensure shall not participate in any way in the falsification of applications for licensure or renewal of license.

(z) [(x)] A licensee shall comply with the requirements of Texas Health and Safety Code, Chapter 611, concerning the release of mental health records and confidential information.

(aa) [~~(y)~~] A licensee shall establish a plan for the custody and control of the client's [~~licensee's client~~] mental health records in the event of the licensee's death or incapacity, or the termination of the licensee's counseling practice. A licensee shall inform each new client of the plan.

§681.42. Sexual Misconduct.

(a) For the purpose of this section the following terms shall have the following meanings.

(1) "Mental health services provider" means a licensee or any other licensed mental health professional, including a licensed social worker, a chemical dependency counselor, a licensed marriage and family therapist, a physician, a psychologist, or a member of the clergy. Mental health services provider also includes employees of the above or employees of a treatment facility. [~~assessment, diagnosis, treatment, or counseling in a professional relationship to assist an individual or group in:~~]

[~~(A) alleviating mental or emotional illness, symptoms, conditions, or disorders, including alcohol or drug addiction;~~]

[~~(B) understanding conscious or subconscious motivations;~~]

[~~(C) resolving emotional, attitudinal, or relationship conflicts; or~~]

[~~(D) modifying feelings, attitudes, or behaviors that interfere with effective emotional, social, or intellectual functioning.~~]

[~~(2) Mental health services provider means a licensee or any other licensed or unlicensed individual who performs or purports to perform professional counseling or mental health services, including a licensed social worker, a chemical dependency counselor, a licensed marriage and family therapist, a physician, a psychologist, or a member of the clergy.~~]

(2) [~~(3)~~] Sexual contact means:

(A) deviate sexual intercourse as defined by the Texas Penal Code, §21.01;

(B) sexual contact as defined by the Texas Penal Code, §21.01;

(C) sexual intercourse as defined by the Texas Penal Code, §21.01; or

(D) requests or offers by a licensee for conduct described by subparagraph (A), (B), or (C) of this paragraph.

(3) [~~(4)~~] "Sexual exploitation" means a pattern, practice, or scheme of conduct, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person. The term does not include obtaining information about a client's sexual history within standard accepted practice while treating a sexual or marital dysfunction.

(4) [~~(5)~~] "Therapeutic deception" means a representation by a licensee that sexual contact with, or sexual exploitation by, the licensee is consistent with, or a part of, a client's or former client's counseling.

(b) A licensee shall not engage in sexual contact with or sexual exploitation of a person who is:

(1) a client as defined in §681.2(7) of this title (relating to Definitions) [~~or former client~~];

(2) an LPC Intern [~~intern~~] supervised by the licensee; or

(3) (No change.)

(4) Sexual contact that occurs more than five years after the termination of the client relationship will not be deemed a violation of this section if the conduct is consensual, not the result of sexual exploitation, and not detrimental to the client. The licensee must demonstrate that there has been no exploitation in light of all relevant factors, including, but not limited to:

(A) the amount of time that has passed since therapy terminated;

(B) the nature and duration of the therapy;

(C) the circumstances of termination;

(D) the client's personal history;

(E) the client's current mental status;

(F) the likelihood of adverse impact on the client and others; and

(G) any statements or actions made by the therapist during the course of therapy suggesting or inviting the possibility of a post-termination sexual or romantic relationship with the client.

[~~(c) A licensee shall not engage in sexual exploitation of a person who is:~~]

[~~(1) a client or former client;~~]

[~~(2) an LPC intern supervised by the licensee; or~~]

[~~(3) a student at an educational institution at which the licensee provides professional or educational services.~~]

(c) [~~(d)~~] A licensee shall not practice therapeutic deception of a person who is a client as defined in §681.2(7) of this title (relating to Definitions) [~~or former client~~].

(d) [~~(e)~~] It is not a defense under subsections (b) - (c) [~~(d)~~] of this section if the sexual contact, sexual exploitation, or therapeutic deception with the person occurred:

(1) with the consent of the client;

(2) outside the professional counseling sessions of the client; or

(3) off the premises regularly used by the licensee for the professional counseling sessions of the client.

(e) [~~(f)~~] The following may constitute sexual exploitation if done for the purpose of sexual arousal or gratification or sexual abuse of any person:

(1) sexual harassment, sexual solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, and:

(A) is offensive or creates a hostile environment, and the licensee knows or is told this; or

(B) is sufficiently severe or intense to be abusive to a reasonable person in the context;

(2) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual;

(3) inappropriate sexual comments about or to a person, including making sexual comments about a person's body;

(4) making sexually demeaning comments about an individual's sexual orientation;

(5) making comments about potential sexual performance except when the comment is pertinent to the issue of sexual function or dysfunction in counseling;

(6) requesting details of sexual history or sexual likes and dislikes when not necessary for counseling of the individual;

(7) initiating conversation regarding the sexual problems, preferences, or fantasies of the licensee;

(8) kissing or fondling;

(9) making a request to date;

(10) any other deliberate or repeated comments, gestures, or physical acts not constituting sexual intimacies but of a sexual nature;

(11) any bodily exposure of genitals, anus or breasts;

(12) encouraging another to masturbate in the presence of the licensee; or

(13) masturbation by the licensee when another is present.

(f) [~~(g)~~] Examples of sexual contact are those activities and behaviors described in the Texas Penal Code, §21.01.

(g) [~~(h)~~] A licensee shall report sexual misconduct as follows.

(1) If a licensee has reasonable cause to suspect that a client has been the victim of sexual exploitation, sexual contact, or therapeutic deception by another licensee or a mental health services provider, or if a client alleges sexual exploitation, sexual contact, or therapeutic deception by another licensee or a mental health services provider, the licensee shall report the alleged conduct not later than the first business day after [~~30th day after~~] the date the licensee became aware of the conduct or the allegations to:

(A) the prosecuting attorney in the county in which the alleged sexual exploitation, sexual contact or therapeutic deception occurred; [~~and~~]

(B) the board if the conduct involves a licensee and any other state licensing agency which licenses the mental health services provider; and [~~.~~]

(C) to the appropriate agency listed in §681.45 of this title (relating to Confidentiality and Required Reporting).

(2) Before making a report under this subsection, the reporter shall inform the alleged victim of the reporter's duty to report and shall determine if the alleged victim wants to remain anonymous.

(3) A report under this subsection need contain only the information needed to:

(A) identify the reporter;

(B) identify the alleged victim, unless the alleged victim has requested anonymity;

(C) express suspicion that sexual exploitation, sexual contact, or therapeutic deception occurred; and

(D) provide the name of the alleged perpetrator.

§681.43. Testing.

(a) Prior to or following the administration of any test [~~testing~~], a licensee shall make known to clients the purposes and explicit use to be made of the test [~~any testing done~~] as a part of a professional counseling relationship.

(b) - (e) (No change.)

§681.44. Drug and Alcohol Use.

A licensee shall not:

(1) use alcohol or drugs in a manner that [~~which~~] adversely affects the licensee's ability to provide counseling treatment intervention services;

(2) - (3) (No change.)

§681.45. Confidentiality and Required Reporting.

(a) - (c) (No change.)

(d) A licensee shall report information if required by any of the following statutes:

(1) Texas Family Code, Chapter 261 [~~2614~~], concerning abuse or neglect of minors;

(2) - (5) (No change.)

§681.46. Licensees and the Board.

(a) - (f) (No change.)

(g) A licensee who files [~~shall not file~~] a complaint with the board in bad faith may be subject to disciplinary action.

§681.47. Assumed Names.

(a) An individual practice by a licensee may be established as a corporation, a limited liability partnership, a limited liability company, or other [~~allowable~~] business entity in accordance with state or federal law.

(b) (No change.)

§681.48. Consumer Information.

(a) A licensee shall inform each client of the name, address, and telephone number of the board for the purpose of reporting violations of the Act or this chapter:

(1) on each application or written contract for services; or

(2) (No change.)

(3) on a bill for counseling treatment intervention provided to a client [~~or third party~~].

(b) - (d) (No change.)

§681.49. Advertising and Announcements.

(a) - (e) (No change.)

(f) All advertisements or announcements of counseling treatment intervention including telephone directory listings by a person licensed by the board shall [~~may~~] clearly state the licensee's licensure status by the use of a title such as "Licensed Counselor", or "Licensed Professional Counselor", or "L.P.C.", or a statement such as "licensed by the Texas State Board of Examiners of Professional Counselors."

(g) Counselors holding a temporary license shall indicate intern status on all advertisements, billing, and announcements of counseling treatment by the use of the term "LPC[~~-~~]Intern."

(h) (No change.)

§681.50. Research and Publications.

(a) In research with a human participant [~~subject~~], a licensee shall take reasonable precautions to ensure that the participant [~~subject~~] does not suffer emotional or physical harm.

(b) - (d) (No change.)

§681.51. Finding of Misconduct Occurring before Licensure [~~Non-Fitness for Licensure Subsequent to Issuance of License~~].

(a) The board may take disciplinary action based upon information received after issuance of a license, if such information would have been the basis for denial of licensure had it been received prior to the issuance of the license.

(b) The board may take disciplinary action against an applicant or licensee for conduct prior to licensure that would have been a violation of a code of ethics if the person was licensed.

§681.52. LPC Interns.

(a) An LPC Intern may not practice within the Intern's own private independent practice of professional counseling.

[(a) An LPC intern may not practice within his or her own private independent practice of professional counseling. Months or hours of independent practice will not count as part of the intern's supervised experience; however, the intern may be employed in his or her supervisor's private practice of professional counseling and the months or hours may be counted.]

(b) An LPC Intern [intern] may be employed on a salary basis or be a consultant or volunteer.

(c) - (d) (No change.)

(e) All billing documents for services provided by an LPC Intern [interns] shall reflect that the LPC Intern [intern] holds a temporary license and is under supervision.

(f) A supervisor may not be an employee of [employed by] an LPC Intern [intern].

(g) The LPC Intern [intern] may compensate the supervisor for time spent in supervision if the supervision is not a part of the supervisor's responsibilities as a paid employee of an agency, institution, clinic, or other business entity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Judy Powell
Chair
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SUBCHAPTER D. APPLICATION PROCEDURES

22 TAC §§681.71 - 681.73

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.71. General.

(a) - (b) (No change.)

(c) Applicants submitting complete application packets, but which contain incomplete or unacceptable information will be notified of the specific deficiency in writing. A copy of each unacceptable document will be returned with the notice. Applicants will have 45 days from the date of the notice to resubmit corrected or replacement documents. Applications not corrected or completed within 45 days of notice of deficiencies will be void and application materials will be returned to the applicant. [Fees associated with the application process are not refundable.]

(d) (No change.)

§681.72. Required Application Materials.

(a) A general application form shall include, but not be limited to:

(1) specific information regarding personal data, employment and type of practice, other state licenses and certifications held, felony or misdemeanor convictions, and educational background[, and references];

(2) - (6) (No change.)

(b) - (c) (No change.)

(d) The supervisory agreement form must be completed, signed and dated by both the supervisor and the applicant. A supervisory agreement form must be submitted for subsequent supervisors and settings, before the supervision begins under the new supervisor or in the new setting. Supervised hours earned without an approved supervisor agreement on file with the board may not be counted toward licensure.

(e) (No change.)

(f) An applicant must submit examination results [Certification] from the National Board of Certified Counselors verifying a passing score on [successful completion of] the National Counselor [Counselors] Exam along with proof of completion of [and] the Texas Jurisprudence Exam. The National Counselor [Counselors] Exam must have been taken no more than five years prior to the date of application. The Texas Jurisprudence Exam must have been taken no more than two years prior to the date of application.

§681.73. Application for Art Therapy Specialty Designation.

(a) - (c) (No change.)

(d) An applicant for a regular license with art therapy specialty designation must pass the National Counselor Exam and complete the Texas Jurisprudence Exam.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. ACADEMIC REQUIREMENTS FOR LICENSURE

22 TAC §§681.81 - 681.83

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.81. General.

(a) (No change.)

(b) Degrees and course work received at foreign universities shall be acceptable only if such course work would [~~could~~] be counted as transfer credit by accredited universities as reported by the American Association of Collegiate Registrars and Admissions Officers. If degrees or course work cannot be documented because the foreign university refuses to issue a transcript or other evidence of the degrees or course work, the board may consider, on a case-by-case basis, accepting degrees or course work based on other evidence presented by the foreign graduate applicant.

(c) - (f) (No change.)

§681.82. Academic Requirements.

(a) - (b) (No change.)

(c) Applicants must also have a supervised practicum experience that is primarily [~~professional~~] counseling in nature of at least 300 clock-hours which were a part of the required planned graduate program.

(1) - (3) (No change.)

§681.83. Academic Course Content.

(a) An applicant must obtain academic course work in each of the following areas:

(1) - (9) (No change.)

(10) practicum (internship) - as described [~~referred to~~] in §681.82(c) of this title (relating to Academic Requirements).

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. EXPERIENCE REQUIREMENTS FOR LICENSURE

22 TAC §§681.91 - 681.93

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.91. Temporary License.

(a) The board may issue a temporary license to an applicant who:

(1) - (4) (No change.)

(5) has completed the required examinations as described in §681.72(f) of this title (relating to Required Application Materials).

(b) To practice counseling in Texas, [~~In this state,~~] a person must obtain a temporary license before the person begins an internship or continues an internship. Hours obtained by an unlicensed person in any setting shall not count toward the supervised experience requirements. Supervised experience hours gained prior to June 1, 1994, may count toward licensure if all academic requirements are met at the time of application. Hours gained after June 1, 1994 cannot count, unless the person held a temporary license while accumulating the hours.

(c) An LPC Intern [~~intern~~] may practice counseling only as part of his or her internship.

(d) An LPC Intern [~~intern~~] must maintain a temporary license during his or her supervised experience.

(e) An initial [~~A~~] temporary license will expire [~~is valid for~~] 36 months from the date of issuance.

(f) An LPC Intern [~~intern~~] who does not complete the supervised experience during the 36 months may submit a written request for an extension from the board. [~~renew his/her temporary license once for an additional 36 months by written request and payment of a fee.~~] The LPC Intern [~~intern~~] must submit proof of successfully completing the Texas Jurisprudence Exam as a condition for renewal.

(g) (No change.)

(h) An LPC Intern [~~intern~~] who holds a temporary license issued before September 1, 2005, may obtain a regular license by:

(1) submitting a supervised experience documentation form documenting successful completion of the required hours of supervised experience in accordance with §681.72(c) of this title (relating to Required Application Materials) and §681.92 of this title; and

(2) passing the National Counselor Exam (NCE) [~~successfully completing the board examination for licensure in accordance with Subchapter G of this chapter (relating to Licensure Examinations)~~].

(i) Applicants who have completed the supervised experience and who have not passed the NCE at the time of application are not eligible for an initial or an additional temporary license. Such applicants may obtain a regular license by taking and passing the NCE.

(j) [~~(i)~~] A person holding a temporary license will provide no direct counseling services unless acting under a supervisor agreement as stated in §681.93 of this title (relating to Supervisor Requirements.)

(k) An applicant coming from another state, who has earned post graduate supervised experience in another state, may submit either their application file from the other state showing their post graduate experience or have their experience documented on this states board forms.

§681.92. Experience Requirements (Internship).

(a) Applicants for licensure must complete a supervised experience acceptable to the board of 3,000 clock-hours [~~or 36 months at 20 hours per week~~].

(b) The supervised experience must include at least 1,500 clock-hours of direct client counseling contact. Experience hours earned via counseling by technological means of communication may count for no more than 10% of the total supervised experience hours. Only actual time spent counseling may be counted.

(c) An Intern [~~applicant~~] must complete the required 3,000 clock-hours of supervised experience in a time period of no fewer than 18 months.

(d) - (e) (No change.)

~~[(f) The applicant who began to accumulate supervised experience on or after October 2, 1996, must have completed at least 48 graduate semester hours in counseling or a counseling-related field and hold a temporary license from the board.]~~

(f) [~~(g)~~] The experience must have consisted primarily of the provision of direct counseling services within a professional relationship to individuals or groups by using a combination of mental health and human development principles, methods, and techniques to achieve the mental, emotional, physical, social, moral, educational, spiritual, or career-related development and adjustment of the client throughout the client's life.

(g) [~~(h)~~] The LPC-Intern [~~applicant~~] must have received direct supervision consisting of an average of [~~a minimum of~~] one hour a week of face-to-face supervision in individual (up to two interns) or group (three or more) settings for each week the intern is engaged in counseling. No more than one half of the total hours of supervision may be received in group supervision.

(h) [~~(i)~~] The experience must have been under the direction of a board approved supervisor.

(i) [~~(j)~~] The board may count excess practicum hours toward the experience requirements of this subchapter if:

(1) the hours were part of the applicant's academic practicum or internship accumulated after the commencement of the applicant's planned graduate program;

(2) the hours are in excess of the 300-hour practicum required by §681.82(c) of this title (relating to Academic Requirements); and

(3) the hours to be counted are not more than 400 hours.

(j) [~~(k)~~] LPC Interns [~~interns~~] shall comply with the ethical standards set out in Subchapter C (relating to Code of Ethics) of this chapter.

~~[(l) A person must obtain a temporary license before the person begins an internship or continues an internship. Hours obtained by an unlicensed person in any setting shall not count toward the supervised experience requirements.]~~

(k) [~~(m)~~] Experience received under a supervisor who is a licensee subject to a board disciplinary order shall not qualify as supervised experience for licensure purposes.

§681.93. Supervisor Requirements.

(a) - (c) (No change.)

(d) A board approved supervisor shall maintain and sign a record(s) to document the date of each supervision conference [~~of a minimum of one hour a week of face-to-face supervision in individual or group settings~~] and [~~to~~] document the LPC Intern's [~~intern's~~] total number of hours of supervised experience accumulated up to the date of the conference.

(e) The full professional responsibility for the counseling activities of an LPC Intern [~~intern~~] shall rest with the intern's board approved supervisor.

(1) The supervisor shall ensure that the LPC Intern [~~intern~~] is aware of and adheres to Subchapter C (relating to Code of Ethics) of this chapter.

(2) A dual relationship between the supervisor and the LPC Intern [~~intern~~] that impairs the supervisor's objective, professional judgment shall be avoided.

(3) A supervisor may not be related within the second degree by affinity or within the third degree by consanguinity to the LPC Intern [~~intern~~].

(4) (No change.)

(5) If a supervisor determines that the LPC Intern [~~intern~~] may not have the counseling skills or competence to practice professional counseling under a regular license, the supervisor shall develop and implement a written plan for remediation of the LPC Intern [~~intern~~].

(6) A supervisor shall timely submit accurate documentation of supervised experience.

(f) (No change.)

(g) A supervisor who become subject to a board disciplinary order is no longer an approved supervisor. The person shall inform all LPC Interns [~~interns~~] of the board disciplinary order and assist the LPC Interns [~~interns~~] in finding alternate supervision.

(h) A supervisor may not be an employee of an LPC Intern [~~employed by an LPC intern~~].

(i) The LPC Intern [~~intern~~] may compensate the supervisor for time spent in supervision if the supervision is not part of the supervisor's responsibilities as a paid employee of an agency, institution, clinic, or other business entity.

(j) Supervisory status may be denied, revoked, or suspended following a fair hearing for violation of the Act or rules. The fair hearing will be conducted under the fair hearing rules of the Department of State Health Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. LICENSURE EXAMINATIONS

22 TAC §§681.101 - 681.103

STATUTORY AUTHORITY

The proposed amendments and new rule are authorized by Occupations Code, §503.203, which authorizes the board to adopt

rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments and new rule affect Occupations Code, Chapter 503.

§681.101. Examination.

(a) Each applicant for licensure is required to take and pass the National Counselor Exam and complete the Texas Jurisprudence Exam prior to application.

(b) (No change.)

(c) The National Counselor Examination [~~Examinations~~] will be administered at testing centers located in various cities throughout the state. The Jurisprudence Exam is available online at the board's website.

(d) The examination fees [~~fee~~] shall be paid to the testing company administering the exams [~~board's contractor~~].

(e) Applicants seeking accommodations for the licensure examination under the Americans with Disabilities Act shall inform the [~~national~~] testing company of any special accommodations needed in advance and in writing. Disability accommodation requests must be accompanied by verification of the disability from a professional who has diagnosed or can attest to the disability and who recommends accommodation.

(f) As of September 1, 2005, LPC Interns [~~LPC Interns~~] who have not passed the Texas exam will be required to pass the National Counselor Exam prior to the expiration of the temporary license.

~~[(g) A regular license will be issued to an applicant only after completion of supervised experience.]~~

§681.102. Notice of Results.

(a) The results of electronically administered licensure examinations shall be provided to the applicant at the testing center upon completion of the examination.

(b) Non-electronically administered examinations may be requested as an ADA accommodation; however, grading will not be immediately available upon completion of the examination.

(c) No matter which numerical or other scoring system is used in arriving at examination results, the official notice of results to applicants shall be stated in terms of "pass" or "fail."

§681.103. Reexamination.

(a) An applicant who fails the licensure examination may schedule a second examination[~~. The subsequent examination can be scheduled~~] no sooner than 90 days after the prior exam.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §681.102

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Examiners of Professional Counselors or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeal is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rule implements Government Code, §2001.039.

The proposed repeal affects Occupations Code, Chapter 503.

§681.102. Grading.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. LICENSING

22 TAC §§681.111 - 681.113

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.111. Issuance of Licenses.

(a) The board will issue a license to each applicant who has satisfactorily fulfilled all requirements for licensure. An initial regular license will expire on the last day of the licensee's birth month occurring after 12 months of licensure have elapsed.

(b) Regular and temporary licenses [~~and regular licenses with an art therapy specialty designation~~] shall bear the signature of the board chair. [~~signatures of board members and be affixed with the seal of the board.~~]

~~[(c) Temporary licenses shall bear the signatures of the board chair and the executive director.]~~

(c) [~~(d)~~] Provisional licenses [~~and provisional licenses with an art therapy specialty designation~~] shall bear the signature of the executive director.

(d) [~~(e)~~] Any license certificate or renewal card issued by the board remains the property of the board and must be surrendered to the board on demand.

(e) [~~(f)~~] The board will replace a lost, damaged, or destroyed license certificate or renewal cards upon a written request from the licensee and payment of the license replacement fee.

(f) [~~(g)~~] Upon the written request and payment of the license certificate duplicate fee by a licensee, the board will provide a licensee with a duplicate for a second place of practice which is designated in a licensee's file.

(g) [~~(h)~~] Only the highest academic degree earned from an accredited college or university in counseling or a counseling-related field may appear on the license certificate.

§681.112. Provisional Licensing.

(a) The board may grant a provisional license to a person who holds, at the time of application, a license as a counselor or art therapist issued by another state, territory, or jurisdiction that is acceptable to the board. An applicant for a provisional license must:

(1) submit an application and license fee;

(2) be licensed in good standing as a counselor or art therapist in another state, territory, or jurisdiction that has licensing requirements that are substantially equivalent to the regular licensing requirements of the Act and submit documentation of such licensure including a copy of the licensure file from the other state, territory or jurisdiction or from the National Credentials Registry and a letter of good standing; and [~~;~~]

(3) have passed the required examinations. [~~; and~~]

[~~(4) submit a letter of sponsorship from a person who holds a regular license issued by the board with whom the provisional licensee may practice.~~]

[~~(b) An applicant for a provisional license may be excused from the requirement of subsection (a)(4) of this section if the board determines that compliance with that subsection constitutes a hardship to the applicant.~~]

[~~(c) The board must complete the processing of a provisional licensee's application for a license not later than the 180th day after the date the provisional license is issued or at the time licenses are issued following the successful completion of the examination, whichever is later. The person holding a provisional license must file all evidence of his or her academic and experience requirements within the 180 days. The board office shall evaluate the information received and may issue a deficiency letter during the 180 days. If the documentation received during the 180 days does not show that the person meets the academic and experience requirements set out in this chapter, the application shall be proposed for denial.~~]

(b) [~~(d)~~] A provisional license is valid for 180 days or until the date the board issues a regular license or denies the provisional licensee's application for a license, whichever occurs first.

(c) [~~(e)~~] The board shall issue a regular license [~~or a regular license with art therapy specialty designation~~] to the holder of a provisional license if the board verifies that the provisional licensee has the academic and experience requirements for a regular license [~~or a regular license with art therapy specialty designation~~].

(d) [~~(f)~~] The board shall consider only states, territories, and jurisdictions of the United States as acceptable for the purposes of provisional licensing.

§681.113. Surrender of License.

(a) A licensee may [~~at any time~~] voluntarily offer to surrender his or her license for any reason[~~, without compulsion~~].

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER I. REGULAR LICENSE RENEWAL; INACTIVE AND RETIREMENT STATUS

22 TAC §§681.121, 681.123 - 681.127

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.121. General.

(a) A regular license [~~or a regular license with art therapy specialty designation~~] must be renewed every two years [~~annually or bi-annually, as determined by the board~~].

(b) A person who holds a regular license [~~or a regular license with art therapy specialty designation~~] must have fulfilled any continuing education requirements prescribed by board rule in order to renew a license.

[~~(c) Each person who holds a regular license or a regular license with art therapy specialty designation is responsible for renewing the license annually or bi-annually, and shall not be excused from paying late renewal fees or renewal penalty fees. Failure to receive notice from the board does not waive payment of late penalty fees.~~]

(c) [~~(d)~~] A person whose license has expired for more than one year shall return his or her license certificate to the board.

(d) [~~(e)~~] A person whose license has expired shall not practice professional counseling or advertise counseling treatment interventions, unless exempted by the Act.

(e) [~~(f)~~] The deadlines established for renewals, late renewals, and license renewal penalty fees in this subchapter are based on the postmark date of the documentation submitted by the licensee.

(f) [~~(g)~~] The board shall deny renewal in accordance with [~~if required by~~] the Texas Education Code, §57.491, relating to defaults on guaranteed student loans.

§681.123. License Renewal.

(a) At least 30 [~~45~~] days prior to the expiration of a regular license [~~or a regular license with art therapy specialty designation,~~] the board will send notice to a licensee's last known address [~~licensee~~] that includes the expiration date of the license [~~, a form to report annual continuing education activity,~~] and instructions for renewing the license.

(b) Failure to receive notice does not relieve the licensee from the responsibility to timely renew.

[~~(b) Notice of license renewal shall be furnished to licensees eligible for renewal. The notice shall require the licensee to notify the board of any changes to information necessary to keep records current.~~]

(c) The board shall not renew a license until it receives the renewal fee and the completed board renewal form including criminal history information, changes of address and other required information [for reporting applicable continuing education requirements].

(d) The board shall issue a renewal card to a licensee who has met all requirements for renewal. The licensee must display the renewal card [in association] with the license.

(e) A license for which a timely request for renewal has been submitted does not expire until the renewal license has been issued or until the renewal application has been denied.

[(e) The license of a person who made a timely and sufficient request for renewal of his or her license does not expire until the application for renewal is finally determined by the board, or in case the application is denied or the terms of the new license limited, until the last day for seeking review of the board's order or a later date fixed by order of a reviewing court.]

§681.124. Late Renewal.

(a) A person who renews a license after the expiration date but on or within 90 days after the expiration date shall pay the appropriate late renewal fee.

(b) A person whose license was not renewed by the expiration date may renew within one year of the expiration date by paying the renewal fee plus the appropriate license renewal penalty fee.

(c) Upon the expiration of a person's license, the board may require the person to return the license certificate to the board.

[(b) If a person has not renewed a license for more than 30 days after the date of expiration, the board shall again inform the person of the expiration date of the license and the amount of the fee required for renewal.]

[(c) The board shall notify a person whose license is expired that the person may not advertise, practice, or represent himself or herself as a counselor in any manner. Upon the expiration of a person's license, the board may notify the person to return the license certificate to the board.]

[(d) A person whose license was not renewed by the expiration date may renew within one year of the expiration date by paying the renewal fee plus the appropriate license renewal penalty fee. Payment must be in the form of a personal check, certified check, or money order.]

(d) [(e)] If a person did not have the required continuing education at the time of expiration of the license, the person must file evidence of completion of the required continuing education before the license can be renewed.

[(1)] A license is considered expired until all requirements for renewal are met.

[(2) Evidence of continuing education shall be the completed continuing education form and other documentation required by the board.]

[(3) The time period from expiration of the license until renewal of the license shall be subtracted from the next one-year continuing education reporting period.]

(e) [(f)] On or after one year from the expiration date, a person may no longer reinstate the license and must reapply by submitting a new application, paying the required fees, and meeting the current requirements for licensure including passing all required examinations.

§681.125. Inactive Status.

(a) - (d) (No change.)

(e) A person must notify the board in writing to return to active status. A [Prior to reinstatement, a] person seeking active status must successfully complete the Texas Jurisprudence Examination. Active status shall begin after receipt of proof of successful completion of the Texas Jurisprudence Examination, completion of 24 hours continuing education within the two years preceding reinstatement of active status and payment of applicable fees.

(f) The person's next continuing education cycle will begin upon return to active status and end on the [last] day of license expiration [the person's birth month].

(g) A person previously approved as a supervisor whose professional counselor license has been inactive for more than two years and who resumes active license status may become a supervisor by again completing [meeting] the supervision [course] requirements of the board. [An inactive status of less than two years will not require a supervision course.]

(h) The licensee must renew the inactive status every two years [biennually].

§681.126. Retired Status.

(a) - (b) (No change.)

(c) A retired license cannot be renewed or reinstated. To be eligible for a new license to practice professional counseling, the person must [would be required to] apply for a new [another] license by meeting requirements in effect at the time of the application, including passing all required examinations.

(d) A request for retired status while a complaint is pending will be treated as a surrender of license under §681.168 of this title (relating to Surrender of License when Complaint is Pending).

§681.127. Active Military.

(a) For purposes of this section, a "designated representative" is a person authorized in writing by the licensee to act on behalf of the licensee. A copy of the written designation must be provided to the board.

(b) If a licensee fails to renew his or her license because the licensee is called to or is on active duty with the armed forces of the United States serving outside of the State of Texas, the licensee or the licensee's designated [authorized] representative may request that the license be declared inactive or be renewed. A request for inactive status shall be made in writing to the board prior to expiration of the license or within one year from the expiration date. A request for renewal may be made before or after the expiration date.

(1) A written request shall include a copy of the official transfer orders of the licensee or other official military documentation showing that the licensee is called to or on active duty serving outside of the State of Texas.

[(1) If the request is made by the licensee's authorized representative, the request must include a copy of the appropriate power of attorney or written evidence of a spousal relationship].

[(2) The written request shall include a copy of the official transfer orders of the licensee or other official military documentation showing that the licensee is called to or on active duty serving outside of the State of Texas.]

(2) [(3)] The payment of the inactive status fee, late renewal fee and licensure renewal penalty fee is waived for a licensee under this section.

(3) [(4)] An active duty licensee shall be allowed to renew under this section without submitting proof of continuing education

hours [if proof is required for renewal; however, the licensee must submit proof of completion of the required number of continuing education hours by the end of the following time period. If the licensee fails to submit proof of completion of the required continuing education by the end of the time period, the board may suspend or revoke or deny renewal of the license].

(4) [(5)] The written request shall include a current address and telephone number for the licensee or the licensee's designated [authorized] representative.

(5) [(6)] The board may periodically notify the licensee or the licensee's designated [authorized] representative that the license of the licensee remains in inactive status [, if applicable].

[(7) Except in extraordinary circumstances, a licensee on active duty serving outside the State of Texas shall notify the board that the licensee is on active duty. The board shall note in the licensee's file that the licensee may be eligible for renewal under this section.]

(6) [(8)] If a licensee is a civilian impacted or displaced for business purposes outside of the State of Texas due to a national emergency or war, the licensee or the licensee's designated [authorized] representative may request that the license be declared inactive in the same manner as described in this section for military personnel. The written request shall include an explanation of how the licensee is impacted or displaced, which explanation shall be on the official letterhead of the licensee's business. The requirements of this section relating to renewal by active duty licensees shall not apply to a civilian under this paragraph.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §681.122

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STATUTORY AUTHORITY

The proposed repeal is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rule implements Government Code, §2001.039.

The proposed repeal affects Occupations Code, Chapter 503.

§681.122. Staggered Renewals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER J. CONTINUING EDUCATION REQUIREMENTS

22 TAC §§681.141, 681.142, 681.144 - 681.147

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.141. General.

(a) The purpose of this subchapter is to establish the continuing education requirements for the renewal of a regular license [or a regular license with art therapy specialty designation which a licensee must complete annually toward furthering of professional development in professional counseling]. These requirements are intended to maintain and improve the quality of professional counseling services provided to the public and maintain licensee knowledge of current research, techniques, and practice; and provide other resources which will improve skill and competence in professional counseling.

(b) (No change.)

(c) A licensee must complete at least four hours of continuing education directly related to counselor ethics issues each renewal period. Completion of the Texas Jurisprudence Exam will count as one hour of continuing education in counselor ethics. [Every other year, a licensee must complete at least three hours of continuing education directly related to counselor ethics issues.]

(d) (No change.)

(e) Beginning January 1, 2007, a licensee must successfully complete the Texas Jurisprudence Examination each renewal period [in order to renew their license].

(f) A licensee holding the supervisor status must complete 3 hours of continuing education directly related to supervision practices as part of the 24 hours of continuing education.

§681.142. Types of Acceptable Continuing Education.

(a) Acceptable continuing education may include:

(1) [be] teaching or consultation in graduate level programs which are designed to increase professional knowledge related to the practice of professional counseling provided that such teaching and consultation is not part of, or required as a part of, one's employment; [.]

(2) [(b)] [Acceptable continuing education may be the] completion of graduate academic courses in areas supporting development of skill and competence in professional counseling at an accredited institution; [.]

(3) [(c)] [Acceptable continuing education may be] participation in case supervision, management, or consultation provided that it is not required as a part of a licensee's employment; is conducted according to stated training or didactic goals such as expertise in

specific techniques including supervision techniques or certification in specialty areas of counseling; is conducted by an appropriately state-licensed, state-certified, or state-registered mental health professional who meets board requirements for supervisors, demonstrates training and expertise in the specific area for which supervision is provided, and has received prior approval by the board for the program; and does not exceed six months in length; [.]

(4) [(d)] [Acceptable continuing education may be] participation or teaching in programs directly related to counseling (e.g., institutes, seminars, workshops, or conferences) which are approved or offered by an accredited college or university, a nationally recognized professional organization in the mental health field or its state or local equivalent organization, or a state or federal governmental agency; [.]

(5) [(e)] [Acceptable continuing education may be the] completion of an independent study program directly related to counseling and approved or offered by a nationally recognized professional organization in the mental health field or its state equivalent, approved or offered by an accredited college or university, or approved or offered by a board approved continuing education provider; and/or [.]

(6) [(f)] [Acceptable continuing education may be] participation in programs directly related to counseling offered by persons approved by the board as continuing education providers.

(b) [(g)] Continuing education hours not applied to the current continuing education requirement may only be applied to meet the continuing education requirement for the following continuing education period [only].

(c) Continuing education must fall within these approved content areas:

(1) normal human growth;

(2) abnormal human behavior;

(3) appraisal or assessment techniques;

(4) counseling theories;

(5) counseling methods or techniques;

(A) counseling individuals; and

(B) groups;

(6) research;

(7) life style and career development;

(8) social, cultural, and family issues;

(9) professional orientation and counselor ethics; and/or

(10) other areas directly supporting the continued development of the profession of counseling skills.

§681.144. Pre-Approved Providers.

(a) Continuing education providers may apply for approval to provide continuing education on forms provided by the board. Applicants [Continuing education provider applicants] shall submit a continuing education provider application form, accompanied by a $50 [continuing education provider] processing fee [and shall renew the approval status annually by submission of a renewal continuing education provider application form, accompanied by a $50 continuing education provider processing fee].

(b) Providers shall renew the approval status annually by submission of a renewal application form, accompanied by a $50 processing fee.

(c) [(b)] Provider [Board approval of provider] applications will be approved based on a review of the application and a determination of the applicant's ability to comply with board rules.

(d) [(c)] Board approvals are effective for twelve months [from the date of board approval. Renewal provider applications must be submitted to the board annually, accompanied by a $50 processing fee].

(e) [(d)] Approved providers of continuing education must comply with board requirements as set out in §681.142 of this title (relating to Types of Acceptable Continuing Education) and §681.145 of this title (relating to Determination of Clock-hour Credits).

(f) [(e)] Approved providers of continuing education must maintain records of all continuing education activities for a period of five years including names of all presenters, complete course descriptions and objectives, teaching methods employed, attendance sheets for each course, sample certificates of attendance, and evaluation documents from each participant for the specific experience. The provider shall provide each participant with written documentation of attendance, which includes the participant's name, the number of approved continuing education hours, the title and date(s) of the program, the provider number, and the signature of the provider.

(g) [(f)] Failure to comply with [board] record keeping requirements or failure to comply with requirements of instructor or course qualifications [is a violation of board rules and] may result in termination of [approval] status or denial of renewal status [of provider approval].

(h) [(g)] Providers are subject to audit of all continuing education records [upon written request by the board]. Upon receipt of written notice of audit, the provider will submit all requested records of continuing education to the board within ten working days. Failure to provide documentation as requested or submission of fraudulent documents will result in termination of approval status.

(i) [(h)] Upon receipt and audit of documents submitted by the provider, the board will notify the provider of the results of the audit. The board may inform the provider of any corrective action needed, may terminate current approval, or may deny future applications based on a finding of non-compliance with this subchapter.

§681.145. Determination of Clock-hour Credits.

(a) Parts of programs which meet the criteria of §681.142[(a), (e), (f), and (g)] of this title (relating to Types of Acceptable Continuing Education) shall be credited on a one-for-one basis with one clock-hour of credit for each clock-hour spent in the continuing education activity.

(b) Teaching in programs which meet the board's criteria as set out in §681.142[(b)] of this title shall be credited on the basis of one clock-hour of credit for one clock-hour taught plus two clock-hours credit for preparation for each hour actually taught. No more than 9 [8] hours of the 24 [12] clock-hour continuing education requirement can be credited under this option. Credit may be granted for the same presentation only once during a two-year [12-month] period.

(c) Completion of academic work at an institution which meets the accreditation standards acceptable to the board and the criteria set out in §681.142[(c)] of this title shall be credited on the basis of 15 clock-hours of credit for each semester hour or 10 clock-hours of credit for each quarter hour completed and for which a passing grade was received.

(d) No more than four clock-hours of the 24 [12] clock-hours continuing education requirement may be obtained through case supervision, management, and consultation programs set out in §681.142[(d)] of this title.

§681.146. Reporting of Continuing Education.

[~~(a) A licensee shall report continuing education on a form provided by the board which the licensee shall complete and sign. No individual documents of participation in continuing education are to be submitted to the board unless requested in writing.~~]

(a) [~~(b)~~] The board will monitor a licensee's compliance with continuing education requirements by the use of random audit. Licensees will be notified in writing if they have been selected for a continuing education audit. Individual supporting documents of participation in continuing education activities are not to be submitted to the board unless a written Notice of Audit is received informing the licensee that he or she has been randomly selected for a document audit. Upon receipt of a Notice of Audit the licensee will be required to submit all appropriate documentation to substantiate compliance with the board's continuing education requirements within 15 working days of receipt of notice.

(b) [~~(c)~~] The licensee is responsible for maintaining continuing education records for a period of two years.

(c) [~~(d)~~] An audit shall be automatic for a licensee who was determined to be non-compliant during the immediately preceding audit.

(d) [~~(e)~~] Appropriate continuing education supporting documentation include: [~~includes:~~]

(1) [~~for a~~] program attended, certificate of attendance;

(2) [~~for~~] teaching or consultation in approved programs, a letter on the sponsoring agency's letterhead giving name of program, location, dates, and subjects taught and giving total clock-hours of teaching or consultation;

(3) [~~for~~] completion of academic work from accredited schools, evidence of course credit;

(4) [~~for~~] official auditing of a graduate level course at a regionally accredited academic institution, a letter from the academic institution or professor which includes the actual number of clock-hours attended.

(e) [~~(f)~~] Failure to meet the continuing education requirement, provide documentation as requested by the board, or providing fraudulent documentation is a violation of board rules and may result in disciplinary action[~~, up to and including license revocation~~].

§681.147. Activities Unacceptable as Continuing Education.

The board will not give continuing education credit to a licensee for:

(1) - (2) (No change.)

(3) meetings and activities not related to the practice of professional counseling that [~~which~~] are required as a part of one's job;

(4) teaching or consultation that [~~which~~] is part of one's employment; and

(5) an experience that [~~which~~] does not fit the types of acceptable continuing education in §681.142 of this title (relating to Types of Acceptable Continuing Education).

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22 TAC §681.143

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STATUTORY AUTHORITY

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The proposed repeal affects Occupations Code, Chapter 503.

§681.143. Procedures for Approval of Programs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER K. COMPLAINTS AND VIOLATIONS

22 TAC §§681.161, 681.162, 681.164 - 681.171

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.161. Complaint Procedures.

(a) A complaint may be filed in writing with the board. [~~A person wishing to report an alleged violation of the Act or the rules by a licensee or other person shall notify the executive director. The initial notification may be in writing, by telephone, or by personal visit to the board office.~~]

(b) A complaint shall not be accepted by the board office if it [~~the official form~~] is not filed within five years of the date of termination of the counselor-client relationship which gave rise to the alleged violations. If the client was a minor at the time of the alleged violation, this time limitation does not begin to run until the client reaches the age of 18 years. A complainant shall be notified of the non-acceptance

of untimely complaints. This time limitation shall not apply to complaints involving violations of §681.42 of this title (relating to Sexual Misconduct) or the board's previous rules relating to sexual activities.

(c) Upon receipt of a complaint, the executive director shall send an acknowledgment letter to the complainant [~~and an official form which the complainant must complete and return to the board before further action may be taken~~]. The executive director may accept an anonymous complaint if there is sufficient information for the investigation.

(d) - (i) (No change.)

(j) If a written complaint is filed with the board that the board has the authority to resolve, the board, periodically, [~~at least quarterly and until final disposition of the complaint,~~] shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

[~~(k) If after due investigation a complaint or allegation is not resolved by the committee of the board, the committee may recommend that the license be revoked, suspended, or denied or that other appropriate actions as authorized by law be taken.~~]

§681.162. Disciplinary Action; Notices.

(a) The board may deny, revoke, temporarily suspend, or suspend a license, or may probate disciplinary action, or may issue a reprimand or impose an administrative penalty to a person who:

(1) - (5) (No change.)

(b) Prior to institution of formal proceedings to discipline a licensee, the board shall give written notice to the licensee [~~by certified mail, return receipt requested,~~] of the facts or conduct alleged to warrant the disciplinary action. The notice shall inform the licensee or applicant of the opportunity to retain legal representation. The licensee or applicant shall be given the opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.

(c) If denial, revocation, or suspension of a license is proposed, the board shall give written notice [~~by certified mail, return receipt requested; or regular mail~~] of the basis for the proposal and that the licensee or applicant must request, in writing, a formal hearing within 15 working days of receipt of the notice, or the right to a hearing shall be waived and the license shall be denied, revoked, or suspended.

(d) - (e) (No change.)

§681.164. Licensing of Persons with Criminal Convictions.

(a) (No change.)

(b) The board shall consider the criminal conviction of a licensee or applicant as possible grounds for disciplinary action or application denial [~~and shall review the conviction~~].

(c) - (d) (No change.)

(e) Procedures for disciplinary action or application denial against persons with criminal convictions: [~~.~~]

(1) - (2) (No change.)

§681.165. Suspension, Temporary [~~Emergency~~] Suspension, Revocation, or Denial.

(a) - (d) (No change.)

§681.166. Informal Disposition.

(a) - (d) (No change.)

(e) The notice shall inform the licensee or applicant of the nature of the alleged violation or the reason for application denial; that the licensee may be represented by legal counsel; that the licensee or applicant may offer the testimony of witnesses and present other evidence as may be appropriate within time limits set by the Executive Director; [~~that a complaints committee member shall be present;~~] that the board's legal counsel shall be present; that the licensee's or applicant's attendance and participation is voluntary; [~~that the complainant and any client involved in the alleged violations may be present;~~] and that the informal conference shall be canceled if the licensee or applicant notifies the executive director that he or she or his or her legal counsel will not attend. A copy of the board's rules concerning informal disposition shall be enclosed with the notice of the informal conference.

[~~(f) The complainant may be informed that he or she may appear and testify or may submit a written statement for consideration at the informal conference.~~]

(f) [~~(g)~~] At least one [~~A~~] member of the complaints committee shall be present at an informal conference.

(g) [~~(h)~~] The conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(h) [~~(i)~~] The licensee, the licensee's attorney, the board's attorney, the executive director and the complaints committee member may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(i) [~~(j)~~] The board's legal counsel may attend each informal conference. The complaints committee member or executive director may call upon the attorney at any time for assistance in the informal conference.

(j) [~~(k)~~] The licensee shall be afforded the opportunity to make statements that are material and relevant.

(k) [~~(l)~~] The complaints committee member or the executive director may exclude anyone from all or part the informal conference [~~all persons except witnesses during their testimony, the licensee, the licensee's attorney, and board staff~~].

(l) [~~(m)~~] Any written statement submitted by the complainant shall be reviewed at the conference.

(m) [~~(n)~~] At the conclusion of the informal conference, the complaints committee member or the executive director may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Act or this chapter. The complaints committee member may also conclude that the board lacks jurisdiction; conclude that a violation of the Act or this chapter has not been established; order that the investigation be closed; or refer the matter for further investigation.

(n) [~~(o)~~] The licensee or applicant may either accept or reject the recommendations at the informal conference. If the recommendations are accepted, an agreed order shall be prepared by the board office or the board's legal counsel and forwarded to the licensee or applicant. The order may contain agreed findings of fact and conclusions of law. The licensee or applicant shall execute the order and return the signed order to the board office within 10 working days of his or her receipt of the order. If the licensee or applicant fails to return the signed order within the stated time period, the inaction shall constitute rejection of the recommendations.

(o) [~~(p)~~] If the licensee or applicant signs and accepts the proposed recommendations, the agreed order shall be submitted to the complaints committee and the board for approval. Placement of the agreed order on the committee and board agendas shall constitute only a recommendation for approval by the board.

(p) [~~(q)~~] The identity of the licensee or applicant shall not be made available to the board until after the board has reviewed and accepted the agreed order unless the licensee or applicant chooses to attend the board meeting. The licensee or applicant shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the licensee or applicant is voluntary.

(q) [~~(r)~~] Upon an affirmative majority vote, the board shall enter an agreed order approving the accepted recommendations. The board may not change the terms of a proposed order but may only approve or disapprove an agreed order unless the licensee or applicant is present at the board meeting and agrees to other terms proposed by the board.

(r) [~~(s)~~] If the board does not approve a proposed agreed order, the licensee or applicant shall be so informed. The matter shall be referred to the executive director for other appropriate action.

(s) [~~(t)~~] A proposed agreed order is not effective until the board has approved the agreed order and the order is signed by the board chair.

(t) [~~(u)~~] A licensee's opportunity for an informal conference under this section shall satisfy the requirement of the Administrative Procedure Act, Texas Government Code, §2001.054(c).

(u) [~~(v)~~] If a licensee who has requested an informal conference fails to appear at the conference and fails to provide notice of the licensee's inability to attend the conference at least 24 hours in advance of the time the conference is scheduled, such action may constitute a withdrawal of the request for a formal hearing.

(v) [~~(w)~~] Refund Order.

(1) The board may order a license holder to pay a refund to a client or other payer as provided in an agreement resulting from an informal settlement conference instead of, or in addition, to imposing an administrative penalty under this chapter.

(2) The amount of a refund ordered as provided in an agreement resulting from an informal settlement conference may not exceed the amount the client or other payer paid to the license holder for a service regulated by this chapter. The board may not require payment of other damages or estimate harm in a refund order.

§681.167. Waiver of Right to Hearing [~~Default Orders~~].

(a) Failure to respond to a notice from the board or if a licensee agrees with the action proposed in the notice, [~~If a right to a hearing is waived under §681.162(c) of this title (relating to Disciplinary Action; Notices) or §681.184(b) of this title (relating to Action After the Hearing) or a licensee fails to appear at an informal conference as described in §681.166(v), relating to informal disposition,~~] the board may enter an order taking disciplinary action or an order of application denial as described in the written notice to the licensee or applicant.

[~~(b) The licensee or applicant and the complainant shall be notified of the date, time, and place of the board meeting at which the default order will be considered. Attendance is voluntary.~~]

(b) [~~(c)~~] Upon an affirmative majority vote, the board shall enter an order imposing appropriate disciplinary action or an order of application denial.

§681.168. Surrender of License when Complaint is Pending.

(a) - (c) (No change.)

(d) Upon surrender of a license during the course of the investigation, the surrender is considered a final disciplinary action and may be considered for denial upon subsequent reapplication for license. [~~accepted and is not subject to reinstatement until a hearing has been held.~~]

§681.169. License Suspension or Denial [~~Suspension of License~~] Relating to Child Support and Child Custody.

(a) - (h) (No change.)

(i) In accordance with the Family Code, §232.0135, the board shall deny the license renewal application of a license holder who has failed to pay child support or failed to comply with the terms of an order providing for the possession of or access to a child.

§681.170. Monitoring of Licensees.

(a) (No change.)

(b) A [~~Each~~] licensee that has had disciplinary action taken against his or her license may [~~shall~~] be required to submit regularly scheduled reports to the executive director. [~~The reports shall be scheduled at intervals appropriate to each individual situation.~~]

(c) - (d) (No change.)

§681.171. Assessment of Administrative Penalties.

(a) - (b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800082
Judy Powell
Chair
Texas State Board of Examiners of Professional Counselors
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For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER L. FORMAL HEARINGS

22 TAC §§681.181, 681.182, 681.184

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the proposed rule amendments implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.181. Purpose.

These rules cover the hearing procedures and practices that are available to persons or parties who request formal hearings. The intended effect of these rules is to supplement the contested case provisions of the [~~Texas~~] Government Code, Chapter 2001, Administrative Procedure Act (APA) and the hearing procedures of the State Office of Administrative Hearings (Texas Government Code, Chapter 2003).

§681.182. Formal Hearing Procedures.

(a) (No change.)

(b) Remedies available upon default. The Administrative Law Judge (ALJ) shall proceed in the party's absence and such failure to appear shall entitle the department to seek informal disposition as provided by the [~~Texas~~] Government Code, Chapter 2001. The ALJ shall grant any motion by the department to remove the case from the contested hearing docket and allow for informal disposition by the commissioner.

(c) The board may enter a default judgment by issuing an order against the defaulting party in which the factual allegations in the notice of hearing are deemed admitted as true without the requirement of submitting additional proof, upon the offer of proof that proper notice was provided to the defaulting party opponent. For purposes of this section, proper notice means notice sufficient to meet the provisions of the [~~Texas~~] Government Code, Chapter 2001, and the State Office of Administrative Hearings Rules of Procedure.

(d) Motion to set aside and reopen. A timely motion by the respondent to set aside the default order and reopen the record may be granted if the respondent establishes that the failure to attend the hearing was neither intentional nor the result of conscious indifference, and that such failure was due to mistake, accident, or circumstances beyond the respondent's control.

(1) A motion to set aside the default order and reopen the record shall be filed with the board prior to the time that the order of the board becomes final pursuant to the provisions of the [~~Texas~~] Government Code.

(2) A motion to set aside the default order and reopen the record is not a motion for rehearing and is not to be considered a substitute for a motion for rehearing. The filing of a motion to set aside the default order and reopen has no effect on either the statutory time periods for the filing of a motion for rehearing or on the time period for ruling on a motion for rehearing, as provided in the [~~Texas~~] Government Code.

(e) (No change.)

§681.184. Action After the Hearing.

(a) (No change.)

(b) Appeals. All appeals from final board [~~department~~] orders or decisions shall be governed by the APA or other pertinent statute and shall be addressed to the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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22 TAC §681.183

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas State Board of Examiners of Professional Counselors or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The proposed repeal is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rule implements Government Code, §2001.039.

The proposed repeal affects Occupations Code, Chapter 503.

§681.183. General.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER M. SCHEDULE OF SANCTIONS

22 TAC §§681.201 - 681.204

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 503.

§681.201. General.

This schedule of sanctions is adopted as required by the Act, §503.402. The schedule is intended to be utilized by the complaints committee as a guide in assessing sanctions for violations of the Act or this chapter. The schedule is also intended to serve as a guide to administrative law judges, and as a written statement of applicable rules or policies of the board pursuant to the [~~Texas~~] Government Code, §2001.058(c). The failure of an administrative law judge to follow the schedule may serve as a basis to vacate or modify an order pursuant to the Texas Government Code, §2001.058(e). This schedule is not intended as a substitute for thoughtful consideration of each individual disciplinary matter. Instead, it should be used as a tool in that effort.

§681.202. Relevant Factors.

When a licensee has violated the Act or this chapter, three general factors combine to determine the appropriate sanction which includes [~~include~~]: the culpability of the licensee; the harm caused or posed; and the requisite deterrence. It is the responsibility of the licensee to bring exonerating factors to the attention of the complaints committee or the administrative law judge. Specific factors are to be considered as set forth as follows.

(1) Seriousness of Violation. The following factors are identified:

(A) - (B) (No change.)

(C) the frequency and time [~~-~~] periods covered by the violations, such as whether there were multiple violations, or a single violation, and the period of time over which the violations occurred.

(2) Nature of the violation. The following factors are identified:

(A) the relationship between the licensee and the person harmed, or exposed to harm[~~,~~] such as a dependent relationship of a client-counselor, or stranger to the licensee;

(B) - (D) (No change.)

(3) - (5) (No change.)

§681.203. Severity Levels [~~Level~~] and Sanction Guide.

The following severity levels and sanction guides are based on the relevant factors in §681.202 of this title (relating to Relevant Factors).

(1) - (5) (No change.)

§681.204. Other Actions.

The complaints committee or executive director, as appropriate, may also resolve pending complaints by issuance of formal advisory letters informing licensees of their duties under the Act or this chapter, and whether the conduct or omission complained of appears to violate such duties. Such advisory letters may be introduced as evidence in any subsequent disciplinary action involving acts or omissions after receipt of the advisory letters. The complaints committee or executive director, as appropriate, may also issue informal reminders to licensees regarding compliance with minor licensing matters. The licensee is not entitled to a hearing on the matters set forth in a formal advisory letter [~~letters~~] or informal reminder [~~reminders~~], but may submit a written response [~~to be included with such letters in their licensing records~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Judy Powell
Chair
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER D. EXECUTIVE DIRECTOR

34 TAC §7.33

The Comptroller of Public Accounts proposes an amendment to §7.33, concerning delegated responsibilities. The rule is amending paragraph (5) to reference Government Code, §2254.021(2), as it pertains to the value of a contract.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in clarifying the limitations on the Executive Director's authority to negotiate, enter into and execute purchases, contracts, leases, lease-purchases, licenses and agreements for services to the Board. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Linda Fernandez, Texas Tomorrow Fund, 111 E. 17th Street, Austin, Texas 78711-1400.

The amendment is proposed under Education Code, §54.618(b)(2), which gives the board the authority to adopt rules to implement this subchapter.

The amendment implements Education Code, §54.618(b)(7), which gives the board the authority to contract for necessary goods and services and engage the services of private consultants, actuaries, trustees, records administrators, legal counsel, and auditors for administrative or technical assistance.

§7.33. Delegated Responsibilities.

Authority to act in the following areas is delegated to the executive director by the board:

(1) to act as agent for service of process and as official liaison with agencies of the state, other states, the federal government and the public;

(2) to initiate, settle or defend litigation by, on behalf of or against the board in collection matters, contract disputes or other matters involving less than $10,000;

(3) to initiate all rulemaking and adopt internal procedures and guidelines;

(4) to supervise, direct, conduct and administer the day-to-day activities of the program;

(5) to negotiate, enter into and execute purchases, contracts, leases, lease-purchases, licenses and agreements involving payments of less than the amount(s) stated in Government Code, §2254.021(2) [~~$10,000~~];

(6) to authorize a refund, change of beneficiary, conversion to another plan and assess fees as specified by the board or consistent with rules and policies adopted by the board; and

(7) to perform such other duties as specified by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200800066
Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 9. MENTAL RETARDATION SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM

40 TAC §§9.153 - 9.155, 9.160, 9.165, 9.174, 9.177, 9.185

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §9.153, concerning definitions; §9.154, concerning description of the Home and Community-based Services (HCS) Program; §9.155, concerning eligibility criteria; §9.160, concerning lapsed level of care (LOC); §9.165, concerning maintenance of HCS Program waiting list; §9.174, concerning certification principles: service delivery; §9.177, concerning certification principles: personnel operations; and §9.185, concerning corrective action and program provider sanctions, in Chapter 9, Mental Retardation Services--Medicaid State Operating Agency Responsibilities, Subchapter D, Home and Community-based Services (HCS) Program.

BACKGROUND AND PURPOSE

The 2008-2009 General Appropriations Act (Article II, Department of Aging and Disability Services, Rider 45, House Bill 1, 80th Legislature, Regular Session, 2007) increased the HCS Program individual cost limit from 125% to 200% of the annual intermediate care facility for persons with mental retardation (ICF/MR) reimbursement rate. The amendments are proposed to change the rule to reflect this increased individual cost limit.

The proposal also adds "falsification of documentation" as a reason DADS may take a discretionary sanction against a program provider. DADS believes that falsification of documents is a serious offense warranting the imposition of any of the adverse actions listed in the rule as DADS deems appropriate. A similar change to the Texas Home Living (TxHmL) Program rules in Chapter 9, Subchapter N, is proposed elsewhere in this issue of the *Texas Register*.

In addition, the proposal describes the types of residential settings that disqualify an individual from receiving HCS Program services. This amendment reflects DADS' policy that the HCS Program is designed for individuals who do not live in congregate care settings such as assisted living facilities and segregated care communities. The proposal also identifies settings to which an individual may be temporarily admitted and during which time DADS may suspend program services.

Further, the proposal renames the counseling and therapies service component as "specialized therapies," renames the psychology service component as "behavioral support," and adds board certified behavior analysts as qualified providers of this service. This revision makes the HCS Program rules consistent with those of the TxHmL Program.

The proposal also removes the requirement that a physician sign the mental retardation/related conditions (MR/RC) Assessment to make the rules consistent with current DADS practice.

Finally, the proposal amends the waiting list processes by allowing an applicant's name to be placed on the waiting list or transferred to another mental retardation authority's (MRA's) waiting list by oral request. The amendment makes the HCS Program procedures more consistent with other DADS waiver programs. In addition, the proposed rules clarify that DADS, not an MRA, removes an applicant's name from the waiting list if the applicant's enrollment has been denied.

SECTION-BY-SECTION SUMMARY

The amendment to §9.153 adds definitions for "four-person residence" and "three-person residence," revises the definition of interdisciplinary team to state that the team may include persons chosen by an individual or legally authorized representative, and updates an agency website address.

The amendment to §9.154 renames the counseling and therapies service component as "specialized therapies," renames the psychology service component as "behavioral support," and updates an agency website address. The amendment also removes unnecessary language describing the residential support service component.

The amendment to §9.155 increases the HCS Program individual cost limit from 125% to 200% of the annual ICF/MR cost, specifies the institutional and congregate settings that disqualify an individual from receiving HCS Program services, identifies the settings to which an individual may be temporarily admitted and during which time DADS may suspend program services, and renames the section title to include service suspensions.

The amendment to §9.160 removes the requirements that a physician sign the MR/RC Assessment and that a provider maintain a statement of verification form in an individual's records to be consistent with current DADS practices.

The amendment to §9.165 allows an applicant to make either a written or oral request for HCS Program services in order for the applicant's name to be placed on the HCS Program waiting list or transferred to another MRA's waiting list, eliminates a redundant provision concerning removal of an applicant's name from the HCS Program waiting list, and clarifies that DADS removes an applicant's name from the HCS Program waiting list if DADS has denied the applicant enrollment and the applicant or legally authorized representative has had an opportunity to exercise the applicant's right to appeal the decision.

The amendment to §9.174 removes the language describing a residence in which supervised living and residential support may be provided and instead adds the terms "three-person residence" and "four-person residence," renames the counseling and therapies service component as "specialized therapies," renames the psychology service component as "behavioral support," and updates agency website addresses.

The amendment to §9.177 renames the counseling and therapies service component as "specialized therapies," lists the professionals who may provide behavioral support, including a board certified behavior analyst, updates references to the Texas Board of Nursing, and corrects a misspelled word.

The amendment to §9.185 adds falsification of documentation as a reason DADS may take a discretionary sanction against a program provider and clarifies that if a provider is placed on vendor hold, a second follow-up review will take place between 30 and 45 calendar days after the effective date of the vendor hold.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the amendments do not place any new requirements on small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is reinforcement of DADS' policy that the HCS Program is designed for individuals who do not live in institutions or segregated care communities.

Individuals who receive behavioral support services will also benefit from the expanded choice of qualified providers with the addition of board certified behavior analysts.

Consistency between the HCS and TxHmL program requirements concerning discretionary sanctions and behavioral support will reduce confusion for program providers.

Finally, the public will also benefit from greater consistency between HCS Program waiting list procedures and other DADS waiver programs.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Cheryl Craddock-Melchor at (512) 438-4512 in DADS' Provider Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-031, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st Street, Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 031" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§9.153. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) - (6) (No change.)

(7) CRCG (Community Resource Coordination Group)--A local interagency group composed of public and private agencies that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The group's role and responsibilities are described in the Memorandum of Understanding on Coordinated Services to Persons Needing Services from More Than One Agency, available on the HHSC website at www.hhsc.state.tx.us [~~www.hhsc.state.tx.us/crcg/crcg.htm~~].

(8) - (15) (No change.)

(16) Four-person residence--A residence:

(A) that a program provider leases or owns;

(B) in which at least one person but no more than four persons receive:

(i) residential support;

(ii) supervised living;

(iii) a non-HCS Program service similar to residential support or supervised living (for example, Community Living Assistance and Support Services or services funded by DFPS or by a person's own resources); or

(iv) respite;

(C) that, if it is the residence of four persons, at least one of those persons receives residential support;

(D) that is not the residence of any persons other than those described in subparagraph (B) of this paragraph; and

(E) that is not a dwelling described in §9.155(a)(5)(G) of this subchapter (relating to Eligibility Criteria).

(17) [~~(16)~~] HCS Program--The Home and Community-based Services Program operated by DADS as authorized by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act.

(18) [~~(17)~~] HCS case manager--An employee of the program provider who is responsible for the overall coordination and monitoring of HCS Program services provided to an individual.

(19) [~~(18)~~] HHSC--The Texas Health and Human Services Commission.

(20) [~~(19)~~] ICAP--Inventory for Client and Agency Planning.

(21) [~~(20)~~] ICF/MR--Intermediate care facility for persons with mental retardation or related conditions.

(22) [~~(21)~~] IDT (interdisciplinary team)--A planning team constituted by the program provider for each individual consisting of, at a minimum, the individual and LAR, HCS case manager, and a nurse. Other applicable persons assigned to provide or who are currently providing direct services to the individual and, as appropriate, a physician, [~~and~~] other professional personnel, and other persons chosen by the in-

dividual or LAR may be included as team members as necessary. If an individual chooses to participate in CDS, a representative of the CDSA may be a member of the IDT if requested by the individual or LAR and agreed to by the CDSA representative.

(23) [~~(22)~~] Individual--A person enrolled in the HCS Program.

(24) [~~(23)~~] IPC (individual plan of care)--A document that describes the type and amount of each HCS Program service component to be provided to an individual and describes medical and other services and supports to be provided through non-program resources.

(25) [~~(24)~~] IPC cost--Estimated annual cost of program services included on an IPC.

(26) [~~(25)~~] IPC year--A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(27) [~~(26)~~] ISP (individual service plan)--A written plan, from which the IPC is derived, developed by the IDT using person-directed planning and, if appropriate, permanency planning. The ISP describes the assessments, recommendations, deliberations, conclusions, justifications, and outcomes regarding the specific services provided to the individual by the program provider.

(28) [~~(27)~~] Large ICF/MR--A non-state operated ICF/MR with a Medicaid certified capacity of 14 or more.

(29) [~~(28)~~] LAR (legally authorized representative)--A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(30) [~~(29)~~] LOC (level of care)--A determination given to an individual as part of the eligibility determination process based on data submitted on the MR/RC Assessment.

(31) [~~(30)~~] LON (level of need)--An assignment given by DADS to an individual upon which reimbursement for foster/companion care, supervised living, residential support, and day habilitation is based. The LON assignment is derived from the service level score obtained from the administration of the ICAP to the individual and from selected items on the MR/RC Assessment.

(32) [~~(31)~~] LVN--Licensed vocational nurse.

(33) [~~(32)~~] MRA (mental retardation authority)--An entity to which HHSC's authority and responsibility described in Texas Health and Safety Code, §531.002(11) has been delegated.

(34) [~~(33)~~] MR/RC Assessment--A form used by DADS for LOC determination and LON assignment.

(35) [~~(34)~~] Natural support network--Those persons, including family members, church members, neighbors, and friends, who assist and sustain an individual with supports that occur naturally within the individual's environment and that are not reimbursed or purposely developed by a person or system.

(36) [~~(35)~~] Person-directed planning--A process that empowers the individual (and the LAR on the individual's behalf) to direct the development of a plan for supports and services that meet the individual's outcomes. The process:

(A) identifies existing supports and services necessary to achieve the individual's outcomes;

(B) identifies natural supports available to the individual and negotiates needed services system supports;

(C) occurs with the support of a group of people chosen by the individual (and the LAR on the individual's behalf); and

(D) accommodates the individual's style of interaction and preferences regarding time and setting.

(37) [~~(36)~~] Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(38) [~~(37)~~] Permanency Planning Review Screen--A screen in CARE that, if completed by an MRA, identifies community supports needed to achieve an individual's permanency planning outcomes and provides information necessary for approval to provide supervised living or residential support to the individual.

(39) [~~(38)~~] Primary correspondent--A person who may request, in accordance with the *Mental Retardation Services and Supports Interest List Policy and Procedures Manual*, that an MRA place an applicant's name on the HCS Program waiting list.

(40) [~~(39)~~] Program provider--An entity that provides HCS Program services under a waiver program provider agreement with DADS as defined in Subchapter Q of this chapter (relating to Enrollment of Medicaid Waiver Program Providers).

(41) [~~(40)~~] Restraint--

(A) A manual method, except for physical guidance or prompting of brief duration, or a mechanical device to restrict:

(i) the free movement or normal functioning of all or a portion of an individual's body; or

(ii) normal access by an individual to a portion of the individual's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the individual resists the physical guidance or prompting.

(42) [~~(41)~~] RN--Registered nurse.

(43) [~~(42)~~] Seclusion--The involuntary separation of an individual away from other individuals and the placement of the individual alone in an area from which the individual is prevented from leaving.

(44) [~~(43)~~] Service back-up plan--A plan, as defined in §41.103 of this title, that ensures continuity of critical program services if service delivery is interrupted.

(45) [~~(44)~~] Service coordinator--An employee of an MRA who is responsible for assisting an individual, or LAR on behalf of the individual, in accessing medical, social, educational, and other appropriate services, including HCS Program services.

(46) [~~(45)~~] Service planning team--A planning team constituted by an MRA consisting of an applicant, LAR, service coordinator, and other persons chosen by the applicant or LAR on behalf of the applicant.

(47) [~~(46)~~] SSI--Supplemental Security Income.

(48) [~~(47)~~] Support consultation--A service, as defined in §41.103 of this title, that is provided by a support advisor employed by, or contracted through, a CDSA or retained as a contractor by an employer in the CDS option.

(49) [~~(48)~~] TANF--Temporary Assistance for Needy Families.

(50) Three-person residence--A residence:

(A) that a program provider leases or owns;

(B) in which at least one person but no more than three persons receive:

(i) residential support;

(ii) supervised living;

(iii) a non-HCS Program service similar to residential support or supervised living (for example, Community Living Assistance and Support Services or services funded by DFPS or by a person's own resources); or

(iv) respite;

(C) that is not a dwelling described in §9.155(a)(5)(G) of this subchapter (relating to Eligibility Criteria).

§9.154. Description of the Home and Community-based Services (HCS) Program.

(a) - (b) (No change.)

(c) HCS Program service components listed in this subsection are selected for inclusion in an individual's IPC to ensure the individual's health and welfare in the community, supplement rather than replace that individual's natural supports and other community services for which the individual may be eligible, and prevent the individual's admission to institutional services. The following service components are defined in the *HCS Program Service Definitions*, which are available at www.dads.state.tx.us [~~http://www.dads.state.tx.us/business/mental_retardation/hcs/index.html~~]. Service components available under the HCS Program are:

(1) (No change.)

(2) specialized [~~counseling and~~] therapies provided by appropriately licensed or certified professionals, including:

(A) - (E) (No change.)

(F) behavioral support [~~psychology~~]; and

(G) (No change.)

(3) (No change.)

(4) residential assistance, excluding room and board, provided in one of the following four ways:

(A) - (C) (No change.)

(D) residential support [~~provided in residences serving four individuals~~];

(5) - (12) (No change.)

(d) - (e) (No change.)

§9.155. Eligibility Criteria and Suspension of HCS Program Services.

(a) An applicant or individual is eligible for HCS Program services if he or she:

(1) - (2) (No change.)

(3) has an approved IPC for which the IPC cost does not exceed 200% [~~125%~~] of the annual ICF/MR reimbursement rate paid to a small ICF/MR, as defined in 1 TAC §355.456 (relating to Reimbursement [~~Rate Setting~~] Methodology) for the individual's level of need as it would be assigned under §9.240 of this chapter (relating to Level of Need) or 200% [~~125%~~] of the estimated annualized per capita cost for ICF/MR services, whichever is greater; [~~and~~]

(4) is not enrolled in another waiver program under §1915(c) of the Social Security Act; and[~~.~~]

(5) does not reside in:

(A) an ICF/MR licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252, or certified by DADS;

(B) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(C) an assisted living facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 247;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services (DSHS);

(F) a residential facility operated by the Texas Youth Commission, a jail, or a prison; or

(G) a setting in which two or more dwellings, including units in a duplex or apartment complex, single family homes, or facilities listed in subparagraphs (A) - (F) of this paragraph, meet all of the following criteria:

(i) the dwellings create a residential area distinguishable from other areas primarily occupied by persons who do not require routine support services because of a disability;

(ii) most of the residents of the dwellings are persons with mental retardation, another developmental disability, or a physical disability; and

(iii) the residents of the dwellings are provided routine support services through personnel, equipment, or service facilities shared with the residents of the other dwellings.

(b) - (c) (No change.)

(d) If an individual is temporarily admitted to one of the following settings, DADS suspends HCS Program services during that admission:

(1) a hospital;

(2) an ICF/MR licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252 or certified by DADS;

(3) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(4) a residential child-care operation licensed or subject to being licensed by DFPS;

(5) a facility licensed or subject to being licensed by the DSHS; or

(6) a residential facility operated by the Texas Youth Commission, a jail, or a prison.

§9.160. Lapsed Level of Care (LOC).

(a) - (d) (No change.)

(e) The program provider must retain in the individual's record[~~:~~]

[~~(1)~~] a completed MR/RC Assessment, signed by [~~the individual's physician and~~] an appropriate representative of the program provider, containing information identical to that on the MR/RC Assessment electronically transmitted to DADS.[~~; and~~]

[~~(2) a Statement of Verification, signed by the CEO of the program provider, copies of which are available by contacting the De-~~

partment of Aging and Disability Services, Provider Services Division, P.O. Box 149030, Austin, Texas 78714-9030.]

§9.165. Maintenance of HCS Program Waiting List.

(a) An MRA must maintain an up-to-date waiting list of applicants waiting to receive HCS Program services for whom the MRA is the designated MRA in CARE.

(1) If an applicant's name is placed on the HCS Program waiting list, the MRA must assign the applicant a registration date that is:

(A) the date of receipt by an MRA of a written or oral request for HCS Program services;

(B) the date of receipt of notification given to the MRA in accordance with Texas Government Code, §531.154, that an individual under 22 years of age has been admitted to one of the following institutions, as defined in Texas Government Code, §531.151:

(i) an ICF/MR;

(ii) a nursing home;

(iii) an institution for the mentally retarded licensed by DFPS;

(iv) a foster group home licensed by DFPS; or

(v) another residential arrangement that provides care to four or more individuals under 22 years of age who are unrelated to each other; or

(C) the date of an MRA's notification to an applicant under 22 years of age as described in §9.164(g)(1) of this subchapter (relating to Process for Enrollment of Applicants).

(2) The MRA must provide written notification to program providers in its local service area of the process that program providers should use to refer applicants who wish to be placed on the HCS Program waiting list.

(3) Except as specified in paragraph (4) of this subsection [section], the MRA must remove an applicant's name from the HCS Program waiting list if it is documented that:

(A) written permission has been obtained from the applicant or the primary correspondent to remove the applicant's name from the waiting list;

(B) the applicant is deceased;

(C) the applicant moved out of the state of Texas;

[(D) DADS has denied the applicant enrollment and the applicant or LAR has had an opportunity to exercise the applicant's right to appeal the decision according to §9.169 of this subchapter (relating to Fair Hearing);]

(D) [(E)] the applicant's name has been added to another MRA's waiting list in accordance with paragraph (6) of this subsection [section];

(E) [(F)] the applicant or LAR has not responded to the MRA's notification of a program vacancy within 30 calendar days of the date of the MRA's notification;

[(G) the applicant or LAR does not choose participation in the HCS Program as documented on the HCS Verification of Freedom of Choice form when offered this choice in accordance with §9.164(e)(2) of this subchapter;]

(F) [(H)] the applicant or LAR declines HCS Program services;

(G) [(I)] the applicant or LAR has not responded to the MRA's attempts to contact the applicant or LAR during its annual update of the waiting list;

(H) [(J)] the applicant or LAR has not documented the choice of HCS Program services over the ICF/MR Program using the HCS Verification of Freedom of Choice form within the time frames described in §9.164(f)(2) of this subchapter; or

(I) [(K)] the applicant or LAR has not documented the choice of a program provider using the Documentation of Provider Choice form within the time frames described in §9.164(f)(3) of this subchapter.

(4) For an applicant under 22 years of age whose name was placed on the HCS Program waiting list in accordance with Texas Government Code, §531.157, an MRA may remove the applicant's name from the waiting list only if[:]

[(A)] the applicant is deceased or[;]

[(B) DADS has denied the applicant's enrollment and the applicant or LAR has had an opportunity to exercise the individual's right to appeal the decision in accordance with §9.169 of this subchapter (relating to Fair Hearing); or]

[(C)] the applicant's name has been transferred in accordance with paragraph (6) of this subsection [section].

(5) If an applicant's name is removed from a waiting list in accordance with paragraph (3) or (4) of this subsection [section], the applicant, LAR, or the MRA may request that DADS review the circumstances under which the applicant's name was removed from the MRA's waiting list. At its discretion, DADS may direct the MRA to reinstate the applicant's name to the waiting list using the previously assigned registration date.

(6) At the [written] request of an applicant or LAR of an applicant who moves to the local service area of a different MRA, the original MRA must provide the applicant's name and date of request for HCS Program services to the MRA in the local service area where the applicant has moved. The MRA receiving the information must add the applicant's name to its waiting list using the date of the request for HCS Program services provided by the transferring MRA.

(b) DADS removes an applicant's name from the HCS Program waiting list if DADS has denied the applicant enrollment and the applicant or LAR has had an opportunity to exercise the applicant's right to appeal the decision in accordance with §9.169 of this subchapter (relating to Fair Hearing).

§9.174. Certification Principles: Service Delivery.

The program provider must:

(1) - (31) (No change.)

(32) provide adaptive aids, including the full range of lifts, mobility aids, control switches/pneumatic switches and devices, environmental control units, medically necessary supplies, and communication aids and repair and maintenance of the aids as determined by the individual's needs and in compliance with the definition in the *HCS Program Service Definitions*, which are available at www.dads.state.tx.us [http://www.dads.state.tx.us/business/mental_retardation/hcs/index.html];

(33) - (39) (No change.)

(40) provide the following specialized [counseling and] therapy services in compliance with the definition in the *HCS Program Service Definitions* as determined by individual needs:

(A) - (F) (No change.)

(G) behavioral support [~~psychology services~~];

(41) provide day habilitation, which may not include services funded by other sources such as §110 of the Rehabilitation Act of 1973 or §602(16) and (17) of the Individuals with Disabilities Education Act, as determined by the individual's needs and in compliance with the definition in the *HCS Program Service Definitions*, including:

(A) - (B) (No change.)

(C) complementing any specialized [~~counseling and~~] therapies listed in the IPC;

(D) - (G) (No change.)

(42) - (45) (No change.)

(46) ensure that supported home living is provided in accordance with the definition in the *HCS Program Service Definitions* and includes the following elements:

(A) - (E) (No change.)

(F) reinforcement of specialized [~~counseling and~~] therapy activities;

(G) - (J) (No change.)

(47) (No change.)

(48) ensure that HCS foster/companion care is provided in accordance with the definition in the *HCS Program Service Definitions* and includes:

(A) - (E) (No change.)

(F) reinforcement of specialized [~~counseling and~~] therapy activities;

(G) - (J) (No change.)

(49) ensure that supervised living is provided:

(A) in a four-person residence that is approved in accordance with §9.188 of this subchapter (relating to DADS' Approval of Residences) or a three-person residence;

(B) [~~(A)~~] by a supervised living provider who provides services and supports as needed by individuals and is present in the residence and able to respond to the needs of individuals during normal sleeping hours; and

[~~(B) in a residence in which no more than three individuals receiving supervised living or other persons receiving similar services are living at any one time;~~]

[~~(C) in a residence in which the program provider holds a property interest; and~~]

(C) [~~(D)~~] only with approval by the DADS commissioner or designee for the initial six months and one six-month extension and only with approval by the HHSC executive commissioner after such 12-month period, if provided to an individual under 22 years of age;

(50) ensure that supervised living is provided in accordance with the definition contained in the *HCS Program Service Definitions* and includes:

(A) - (E) (No change.)

(F) reinforcement of specialized [~~counseling and~~] therapy activities;

(G) - (J) (No change.)

(51) ensure that residential support is provided:

(A) in a four-person residence that is approved in accordance with §9.188 of this subchapter or a three-person residence;

(B) [~~(A)~~] by a residential support provider who is present in the residence and awake whenever an individual is present in the residence;

(C) [~~(B)~~] by residential support providers assigned on a daily shift schedule that includes at least one complete change of provider staff each day; and

[~~(C) in a residence in which no more than four individuals and other persons receiving similar services are living at any one time and which is approved in accordance with §9.188 of this subchapter (relating to DADS' Approval of Residences);~~]

[~~(D) in a residence in which the program provider holds a property interest; and~~]

(D) [~~(E)~~] only with approval by the DADS commissioner or designee for the initial six months and one six-month extension and only with approval by the HHSC executive commissioner after such 12-month period, if provided to an individual under 22 years of age;

(52) ensure that residential support is provided in accordance with the definition contained in the *HCS Program Service Definitions* and includes the following elements:

(A) - (E) (No change.)

(F) reinforcement of specialized [~~counseling and~~] therapy activities;

(G) - (J) (No change.)

(53) - (57) (No change.)

(58) within three working days of initiating supervised living or residential support to an individual under 22 years of age, provide the information listed in paragraph (59) of this section to the following:

(A) the MRA in whose local service area the residence is located (see www.dads.state.tx.us [~~www.dads.state.tx.us/contact/mra/index.cfm~~] for a listing of MRAs by county or city);

(B) the CRCG for the county in which the applicant's LAR lives (see www.hhsc.state.tx.us [~~www.hhsc.state.tx.us/crcg/crcg.htm~~] for a listing of CRCG chairpersons by county); and

(C) the local school district for the area in which the residence is located, if the individual is at least three years of age or the early childhood intervention (ECI) program for the county in which the residence is located, if the individual is less than three years of age (see www.dars.state.tx.us [~~www.dars.state.tx.us/ecis/index.shtml~~] or call 1-800-250-2246 for a listing of ECI programs by county); and

(59) (No change.)

§9.177. Certification Principles: Personnel Operations.

(a) - (g) (No change.)

(h) The program provider must ensure that the HCS case manager is currently qualified by having:

(1) - (3) (No change.)

(4) a license by the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~] as an LVN or RN with one year of experience in human services.

(i) The program provider must ensure that each provider of specialized [~~counseling and~~] therapies is currently qualified by being

licensed by the State of Texas or certified [by the State of Texas] in the specific area for which services are delivered or be providing services in accordance with state law. The program provider must ensure that the provider of behavioral support: [A psychologist employed by a community mental health and mental retardation center must be licensed in accordance with state law or certified as described in Chapter 5, Subchapter D of this title (relating to Diagnostic Eligibility for Services and Supports--Mental Retardation Priority Population and Related Conditions).]

(1) is licensed as a psychologist in accordance with Chapter 501 of the Texas Occupations Code;

(2) is licensed as a psychological associate in accordance with Chapter 501 of the Texas Occupations Code;

(3) has been issued a provisional license to practice psychology in accordance with Chapter 501 of the Texas Occupations Code;

(4) is certified by DADS as described in §5.161 of this title (relating to TDMHMR-Certified Psychologist); or

(5) is certified as a behavior analyst by the Behavior Analyst Certification Board, Inc.

(j) - (k) (No change.)

(l) The program provider must ensure that nursing services are provided by a nurse who is currently qualified by being licensed by the Texas Board of Nursing [Nurse Examiners for the State of Texas] as an RN or LVN.

(m) (No change.)

(n) The program provider must take the following actions regarding applicants for employment, contractors, and employees of the program provider whose duties involve or would involve direct contact with an individual:

(1) (No change.)

(2) search the Employee Misconduct Registry and the Nurse Aide [Aid] Registry maintained by DADS to determine whether the applicant, contractor, or employee is designated in either registry as having abused, neglected, or exploited a resident or consumer of a facility or misappropriated a resident's or consumer's property, and refrain from employing or contracting with persons who are designated in either registry.

§9.185. Corrective Action and Program Provider Sanctions.

(a) - (c) (No change.)

(d) If DADS determines that the program provider is out of compliance with between 10 and 20 percent of the certification principles at the end of the review exit conference, including any principles found out of compliance in the previous review, DADS does not certify the program provider and applies Level I sanctions against the program provider.

(1) - (2) (No change.)

(3) If DADS implements vendor hold against the provider, DADS conducts a second on-site follow-up review between 30 and 45 calendar days after [from] the effective date of the vendor hold. Based on the results of the review, DADS:

(A) - (B) (No change.)

(e) - (f) (No change.)

(g) Notwithstanding subsections (b) - (e) of this section, if DADS determines that a program provider's failure to comply with one or more of the certification principles is of a serious or pervasive nature, DADS may, at its discretion, take any action described in this section against the program provider. Serious or pervasive failure to comply includes:

(1) conditions that have potentially dangerous consequences for individuals served by the program provider; or

(2) conditions that affect a large percentage of individuals served by the program provider.

(h) Notwithstanding subsections (b) - (e) of this section, if DADS determines that a program provider has falsified documentation used to demonstrate compliance with this subchapter, DADS may, at its discretion, take any action described in this section against the program provider.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 3, 2008.

TRD-200800035
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

♦ ♦ ♦

SUBCHAPTER N. TEXAS HOME LIVING (TXHML) PROGRAM

40 TAC §§9.553, 9.554, 9.556, 9.558, 9.559, 9.570, 9.573, 9.577, 9.580

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §9.553, concerning definitions; §9.554, concerning description of the TxHmL Program; §9.556, concerning eligibility criteria; §9.558, concerning individual plan of care (IPC); §9.559, concerning request to increase service category limits; §9.570, concerning permanent discharge from the TxHmL Program; §9.573, concerning reimbursement; §9.577, concerning corrective action and program provider sanctions; and §9.580, concerning certification principles: quality assurance, in Chapter 9, Mental Retardation Services--Medicaid State Operating Agency Responsibilities, Subchapter N, Texas Home Living (TxHmL) Program.

BACKGROUND AND PURPOSE

The service components in the TxHmL Program are divided into two service categories, the Community Living Service Category and the Technical and Professional Supports Service Category. Currently, the rule states that the annual cost limit (i.e. service category limit) for the Community Living Service Category is $8,000, the service category limit for the Technical and Professional Supports Service Category is $2,000, and the total cost limit for these categories combined is $10,000. The total cost limit is the amount that the cost of an individual's Individual Plan of Care (IPC) may not exceed. The service category and total cost limits were revised in 2007. The purpose of the amendments is to delete the specific monetary limits and instead reference the TxHmL Program waiver application approved by the Centers for Medicare and Medicaid Services (CMS) where the

revised limits have been listed and will be updated as necessary. The cost limits are based, in part, on TxHmL provider rates adopted by the Health and Human Services Commission (HHSC). A rate increase by HHSC may cause an individual's IPC cost to exceed the total cost limit without an increase in the amount of services being provided and, therefore, the service category limits and total cost limits were revised to allow for increased IPC costs. Future rate increases may cause these limits to be revised again. A reference to the waiver application in the rule directs readers to the most current information regarding cost limits.

In addition, the purpose of the amendments is to add a definition of "own home or family home" that describes the types of institutional and congregate settings that disqualify an individual from receiving TxHmL Program services. This amendment reflects DADS policy that the TxHmL Program is designed for individuals who do not live in an institutional setting. Further, the proposal identifies settings to which an individual may be temporarily admitted, during which time DADS may suspend program services.

The amendments also place current billing practices into rule and permit DADS to require a program provider to develop and submit, in accordance with DADS instructions, a corrective action plan that improves the program provider's billing practices. This new requirement is consistent with that in the HCS Program.

Finally, the amendments allow for DADS to take discretionary actions against a provider if the provider falsifies documents used to demonstrate compliance with the rule. DADS believes that falsification of documents is a serious offense warranting the imposition of any of the adverse actions listed in the rule as DADS deems appropriate.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §9.553 adds definitions for "CARE," "critical incident data," and "own home or family home," which specifies the institutional and congregate settings that disqualify an individual from receiving TxHmL Program services, and deletes the definitions of "family home" and "own home."

The amendment to §9.554 removes the monetary cost limits for the Community Living Service Category and Professional and Technical Support Service Category and replaces them with references to Appendix C of the TxHmL Program waiver application.

The amendment to §9.556 updates terminology regarding eligibility criteria.

The amendments to §9.558 and §9.559 remove the annual IPC monetary cost limit and replace it with language referencing the combined cost limit specified in the TxHmL Program waiver application approved by CMS.

The amendment to §9.570 identifies the settings to which an individual may be temporarily admitted, during which time DADS may suspend program services. The amendment also revises the section title.

The amendment to §9.573 places current billing practices into rule, references DADS billing and payment review protocol, and allows DADS to require a program provider to develop and submit, in accordance with DADS instructions, a corrective action plan that improves the program provider's billing practices. The amendment adds provisions that allow DADS to place a hold on vendor payments or terminate a program provider agreement if a program provider does not submit a corrective action plan or complete the required action. The amendment will make the TxHmL rules consistent with the Home and Community-based Services (HCS) Program rules.

The amendment to §9.577 adds falsification of documentation as a reason DADS may take discretionary sanctions against a program provider and clarifies the time period in which DADS conducts a second on-site follow-up review.

The amendment to §9.580 requires that a program provider record critical incident data in the CARE system within 30 days after the last day of the month the incident is reported, consistent with a requirement in the program provider agreement.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the amendments do not place any new requirements on small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is the provision of current information regarding revised IPC cost limits, a clarification of the settings in which TxHmL Program services are not provided, improved provider billing practices, and consistency between the HCS and TxHmL program requirements concerning critical incident reporting and billing and payment reviews.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Cheryl Craddock-Melchor at (512) 438-4512 in DADS' Provider Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-032, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment

period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 032" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§9.553. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) (No change.)

(2) CARE--Client Assignment and Registration System. A DADS database with demographic and other data about an individual who is receiving services and supports or on whose behalf services and supports have been requested.

(3) [~~(2)~~] CDS--Consumer directed services. A service delivery option as defined in §41.103 of this title (relating to Definitions).

(4) [~~(3)~~] CDSA--Consumer directed service agency. An entity, as defined in §41.103 of this title, that provides financial management services and, at the request of an individual or LAR, support consultation to an individual participating in CDS.

(5) [~~(4)~~] CMS--Centers for Medicare and Medicaid Services. The federal agency that administers Medicaid programs.

(6) Critical incident data--Information a program provider enters in CARE that includes the number of behavior intervention plans authorizing restraint, the number of restraints used, the number of medication errors, the number of serious physical injuries, and the number of deaths.

(7) [~~(5)~~] DADS--The Department of Aging and Disability Services.

(8) [~~(6)~~] DFPS--The Department of Family and Protective Services.

[~~(7) Family home--The home of an applicant's or individual's natural, adoptive, or DFPS foster family.~~]

(9) [~~(8)~~] Financial management services--A service, as defined in §41.103 of this title, that is provided to an individual participating in CDS.

(10) [~~(9)~~] HCS Program--The Home and Community-based Services Program operated by DADS as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(11) [~~(10)~~] HHSC--The Texas Health and Human Services Commission.

(12) [~~(11)~~] ICF/MR Program--The Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions Program.

(13) [~~(12)~~] Individual--A person enrolled in the TxHmL Program.

(14) [~~(13)~~] IPC--Individual plan of care. A document that describes the type and amount of each TxHmL Program service component to be provided to an individual and medical and other services and supports to be provided through non-TxHmL Program resources.

(15) [~~(14)~~] IPC cost--Estimated annual cost of program services included on an IPC.

(16) [~~(15)~~] IPC year--A 12-month period of time starting on the date an authorized initial or renewal IPC begins.

(17) [~~(16)~~] LAR--Legally authorized representative. A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(18) [~~(17)~~] LOC--Level of care. A determination made by DADS about an applicant or individual as part of the TxHmL Program eligibility determination process based on data submitted on the MR/RC Assessment.

(19) [~~(18)~~] LON--Level of need. An assignment given by DADS for an applicant or individual that is derived from the service level score obtained from the administration of the Inventory for Client and Agency Planning (ICAP) to the individual and from selected items on the MR/RC Assessment.

(20) [~~(19)~~] MRA--Mental retardation authority. An entity to which HHSC's authority and responsibility described in THSC, §531.002(11) has been delegated.

(21) [~~(20)~~] MR/RC Assessment--A form used by DADS for LOC determination and LON assignment.

(22) Own home or family home--A residence that is not:

(A) an intermediate care facility for persons with mental retardation or related conditions (ICF/MR) licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252 or certified by DADS;

(B) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(C) an assisted living facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 247;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services;

(F) a residential facility operated by the Texas Youth Commission, a jail, or a prison; or

(G) a setting in which two or more dwellings, including units in a duplex or apartment complex, single family homes, or facilities listed in subparagraphs (A) - (F) of this paragraph, meet all of the following criteria:

(i) the dwellings create a residential area distinguishable from other areas primarily occupied by persons who do not require routine support services because of a disability;

(ii) most of the residents of the dwellings are persons with mental retardation, another developmental disability, or a physical disability; and

(iii) the residents of the dwellings are provided routine support services through personnel, equipment, or service facilities shared with the residents of the other dwellings.

[~~(21) Own home--A residence owned or leased by an applicant or individual in which the applicant or individual lives.~~]

(23) [~~(22)~~] Performance contract--A written agreement between DADS and an MRA for the provision of one or more functions as described in THSC, §533.035(b).

(24) [~~(23)~~] PDP--Person-directed plan. A plan developed for an applicant in accordance with §9.567 of this subchapter (relating to Process for Enrollment) that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or LAR on behalf of the applicant.

(25) [~~(24)~~] Program provider--An entity that provides TxHmL Program services under a program provider agreement with DADS in accordance with Subchapter Q of this chapter (relating to Enrollment of Medicaid Waiver Program Providers).

(26) [~~(25)~~] Program provider agreement--A written agreement between DADS and a program provider that obligates the program provider to deliver TxHmL Program service components, except for financial management services and support consultation.

(27) [~~(26)~~] Respite facility--A site that is not a residence and that is owned or leased by a program provider for the purpose of providing out-of-home respite to not more than six individuals receiving TxHmL Program services or other persons receiving similar services at any one time.

(28) [~~(27)~~] Service back-up plan--A plan, as defined in §41.103 of this title, that ensures continuity of critical service components if service delivery is interrupted.

(29) [~~(28)~~] Service coordinator--An employee of an MRA who is responsible for assisting an applicant, individual, or LAR to access needed medical, social, educational, and other appropriate services including TxHmL Program services.

(30) [~~(29)~~] Service planning team--A planning team constituted by an MRA consisting of an applicant or individual, LAR, service coordinator, and other persons chosen by the applicant, individual, or LAR.

(31) [~~(30)~~] Support consultation--A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option at the request of the individual or LAR.

(32) [~~(31)~~] TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(33) [~~(32)~~] THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(34) [~~(33)~~] TxHmL Program--The Texas Home Living Program, operated by DADS and approved by CMS in accordance with §1915(c) of the Social Security Act, that provides community-based services and supports to eligible individuals who live in their own homes or in their family homes.

§9.554. Description of the TxHmL Program.

(a) - (f) (No change.)

(g) TxHmL Program service components, as defined in §9.555 of this subchapter, are divided into two service categories, the Community Living Service Category and the Technical and Professional Supports Service Category. Each category has an annual cost limit referred to as the service category limit. The combined cost of the two service categories must not exceed the combined cost limit [~~$10,000~~] per individual per IPC year specified in Appendix C of the TxHmL Program waiver application approved by CMS, which is available at http://www.dads.state.tx.us.

(1) The service category limit for the Community Living Service Category [~~is $8,000~~] per individual per IPC year is specified in Appendix C of the TxHmL Program waiver application approved by CMS, unless an exception is approved in accordance with §9.559 of this subchapter (relating to Request to Increase Service Category Limits). This service category includes the following service components:

(A) - (G) (No change.)

(2) The service category limit for the Professional and Technical Supports Service Category [~~is $2,000~~] per individual per IPC year is specified in Appendix C of the TxHmL Program waiver application approved by CMS, unless an exception is made in accordance with §9.559 of this subchapter. This service category includes the following service components:

(A) - (F) (No change.)

(h) (No change.)

§9.556. Eligibility Criteria.

(a) An applicant or individual is eligible for the TxHmL Program if:

(1) (No change.)

(2) the applicant or individual meets the eligibility criteria for the ICF/MR LOC I [~~ICF/MR I LOC~~] as defined in §9.238 of this chapter (relating to Level of Care I Criteria) as determined by DADS according to §9.560 of this subchapter (relating to Level of Care (LOC) Determination);

(3) - (8) (No change.)

(9) the applicant or individual lives in the applicant's or individual's own home or family [~~family's~~] home.

(b) (No change.)

§9.558. Individual Plan of Care (IPC).

(a) - (c) (No change.)

(d) DADS reviews a submitted initial, revised, or renewal IPC and approves, modifies, or does not approve the IPC. DADS does not approve an IPC having a total cost that exceeds the combined cost limit specified in Appendix C of the TxHmL Program waiver application approved by CMS [~~of more than $10,000 per IPC year~~].

(e) - (f) (No change.)

§9.559. Request to Increase Service Category Limits.

(a) If the cost of either service category included on an IPC submitted to DADS exceeds the service category limits described in §9.554(g)(1) and (2) of this subchapter (relating to Description of the TxHmL Program) but the total annual cost of the IPC does not exceed the combined cost limit specified in Appendix C of the TxHmL Program waiver application approved by CMS [~~$10,000~~], an individual's service coordinator must request from DADS an increase in the appropriate service category limit.

(1) - (2) (No change.)

(b) - (f) (No change.)

§9.570. Permanent Discharge from the TxHmL Program and Suspension of TxHmL Program Services.

(a) - (e) (No change.)

(f) If an individual is temporarily admitted to one of the following settings, DADS suspends TxHmL Program services during that admission:

(1) a hospital;

(2) an ICF/MR licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252 or certified by DADS;

(3) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(4) a residential child-care operation licensed or subject to being licensed by DFPS;

(5) a facility licensed or subject to being licensed by the Department of State Health Services; or

(6) a residential facility operated by the Texas Youth Commission, a jail, or a prison.

§9.573. Reimbursement.

(a) - (b) (No change.)

(c) Billing and payment reviews.

(1) DADS conducts billing and payment reviews to monitor a program provider's compliance with this subchapter and the *TxHmL Program Service Definitions and Billing Guidelines*. DADS conducts such reviews in accordance with the *TxHmL Billing and Payment Review Protocol* set forth in the *TxHmL Program Service Definitions and Billing Guidelines*. As a result of a billing and payment review, DADS may:

(A) recoup payments from a program provider; and

(B) based on the amount of unverified claims, require a program provider to develop and submit, in accordance with DADS instructions, a corrective action plan that improves the program provider's billing practices.

(2) A corrective action plan required by DADS in accordance with paragraph (1)(B) of this subsection must:

(A) include:

(i) the reason the corrective action plan is required;

(ii) the corrective action to be taken;

(iii) the person responsible for taking each corrective action; and

(iv) a date by which the corrective action will be completed that is no later than 90 calendar days after the date the program provider is notified the corrective action plan is required;

(B) be submitted to DADS within 30 calendar days after the date the program provider is notified the corrective action plan is required; and

(C) be approved by DADS before implementation.

(3) Within 30 calendar days after the corrective action plan is received by DADS, DADS notifies the program provider if the corrective action plan is approved or if changes to the plan are required.

(4) If DADS requires a program provider to develop and submit a corrective action plan in accordance with paragraph (1)(B) of this subsection and the program provider requests an administrative hearing for the recoupment in accordance with §9.575 of this chapter (relating to Program Provider's Right to Administrative Hearing), the program provider is not required to develop or submit a corrective action plan while a hearing decision is pending. DADS notifies the program provider if the requirement to submit a corrective action plan or the content of such a plan changes based on the outcome of the hearing.

(5) If the program provider does not submit the corrective action plan or complete the required corrective action within the time frames described in paragraph (2) of this subsection, DADS may impose a vendor hold on payments due to the program provider under the program provider agreement until the program provider takes the corrective action.

(6) If the program provider does not submit the corrective action plan or complete the required corrective action within 30 calendar days after the date a vendor hold is imposed in accordance with paragraph (5) of this subsection, DADS may terminate the program provider agreement.

§9.577. Corrective Action and Program Provider Sanctions.

(a) - (c) (No change.)

(d) If DADS determines that the program provider is out of compliance with between 10 and 20 percent of the certification principles at the end of the review exit conference, including any principles found out of compliance in the previous review, DADS does not certify the program provider and applies Level I sanctions against the program provider.

(1) - (2) (No change.)

(3) If DADS implements vendor hold against the provider, DADS conducts a second on-site follow-up review between 30 and 45 calendar days after [~~from~~] the effective date of the vendor hold. Based on the results of the review, DADS:

(A) - (B) (No change.)

(e) - (g) (No change.)

(h) Notwithstanding subsections (b) - (e) of this section, if DADS determines that a program provider has falsified documentation used to demonstrate compliance with this subchapter, DADS may, at its discretion, take any action described in this section against the program provider.

§9.580. Certification Principles: Quality Assurance.

(a) - (q) (No change.)

(r) A program provider must enter critical incident data in CARE no later than 30 days after the last day of the month being reported.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 3, 2008.

TRD-200800036
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.101, concerning definitions; §19.403 concerning notice of rights and services; §19.701, concerning quality of life; §19.2004, concerning determinations and actions pursuant to inspections; and new §19.706, concerning resident group and family council, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the amendments and new section is to implement some provisions of Senate Bill (SB) 131, 80th Legislature, 2007, which amended the Texas Health and Safety Code, Chapter 242. Texas Health and Safety Code, §242.0445 requires a nursing facility to provide a representative of the facility's family council with a copy of the final statement of violations no later than the fifth working day after the facility receives the statement. Texas Health and Safety Code, §§242.901 - 242.906 allow family councils to exist in nursing facilities. The formation of a resident or family group or council, in a facility, was authorized in federal regulations prior to the passage of SB 131. Senate Bill 131, however, defines a family council and more specifically outlines a nursing facility's duties related to the formation, maintenance, and operation of a family council.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.101 adds definitions of "family council" and "resident group."

The proposed amendment to §19.403 requires a nursing facility to provide written notification to a resident's family representative, upon admission of the resident, of the right to form a family council with the families of other residents. If a family council exists upon the admission of the resident, the amendment requires the nursing facility to provide the resident's family representative with written information pertaining to the meeting time, date, location, and contact person for the family council. The amendment also updates terminology to clarify language and corrects rule cross-references.

The proposed amendment to §19.701 removes paragraph (3), which outlines participation in resident and family groups. Paragraph (3) was incorporated into and most appropriately belongs in new §19.706.

The proposed new §19.706 allows for the formation and operation of a resident group or family council or both in a nursing facility. The new rule provides that: (1) a resident has the right to organize and participate in resident groups; (2) the families of residents have the right to organize a family council that may make recommendations to the facility regarding policy and operational decisions affecting resident care and quality of life and promote educational programs for the health and happiness of residents; and (3) a facility must hear and act upon the grievances of a resident group or family council, provide private space for the groups to meet inside the facility, provide a designated staff person to assist the groups, and allow staff or visitors to attend meetings at the resident group or family council's request. When a family council exists, a facility must: (1) designate a staff person to serve as liaison to the council; (2) provide a written response to a family council's request within five working days; and (3) permit a family council representative to talk about concerns with someone inspecting or surveying a facility. The new section prohibits a facility from: (1) terminating a family council; (2) interfering or tampering with outside mail addressed to the family council; and (3) interfering with the family council's formation, maintenance, or operation.

The proposed amendment to §19.2004 amends §19.2004(d) to state that a facility must provide a representative of the facility's family council with a copy of the final statement of violations no later than the fifth working day after the facility receives the statement. The amendment to §19.2004(e) clarifies rule language concerning the time frame in which a nursing facility must submit an acceptable plan of correction for violations of regulations.

The proposal also updates terminology and state agency names and corrects rule cross-references to ensure that the rule language reflects agency name changes resulting from the consolidation of health and human services agencies in 2004, and updates sections to make them consistent with other DADS rules.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments and new section, because the proposal places no new requirements on businesses that would have a significant cost to business.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is that family and nursing facility staff will work together to improve resident quality of care and solve resident issues and concerns, which may also improve resident quality of life.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-019, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days

after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 019" in the subject line.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445, which governs the authority of family councils and the responsibility of nursing facilities related to family councils.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§242.901-242.906 and §242.0445.

§19.101. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (41) (No change.)

(42) Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(43) [~~(42)~~] Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(44) [~~(43)~~] Fiduciary agent--An individual who holds in trust another's monies.

(45) [~~(44)~~] Free choice--Unrestricted right to choose a qualified provider of services.

(46) [~~(45)~~] Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(47) [~~(46)~~] Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(48) [~~(47)~~] HCFA--Health Care Financing Administration, now the Centers for Medicare & Medicaid Services (CMS).

(49) [~~(48)~~] Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(50) [~~(49)~~] Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I.

(51) [~~(50)~~] HIV--Human Immunodeficiency Virus.

(52) [~~(51)~~] Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to DADS.

(53) [~~(52)~~] Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(54) [~~(53)~~] Inspection--Any on-site visit to or survey of an institution by DADS for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(55) [~~(54)~~] Interdisciplinary care plan--See the definition of "comprehensive care plan."

(56) [~~(55)~~] IV--Intravenous.

(57) [~~(56)~~] Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(58) [~~(57)~~] Licensed health professional--A physician; physician assistant; nurse practitioner; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; or licensed social worker.

(59) [~~(58)~~] Licensed nursing home (facility) administrator--A person currently licensed by the Texas Board of Nursing Facility Administrators.

(60) [~~(59)~~] Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Board of Nurse Examiners for the State of Texas as a licensed vocational nurse.

(61) [~~(60)~~] Life Safety Code (also referred to as the Code or NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(62) [~~(61)~~] Life safety features--Fire safety components required by the Life Safety Code, including, but not limited to, building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(63) [~~(62)~~] Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this title (relating to Directives and Medical Powers of Attorney)).

(64) [~~(63)~~] Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(65) [~~(64)~~] Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Health and Safety Code, §121.021.

(66) [~~(65)~~] Long-term care-regulatory--DADS' Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Title XIX participation.

(67) [~~(66)~~] Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

(68) [~~(67)~~] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(69) [~~(68)~~] Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(70) [~~(69)~~] Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(71) [~~(70)~~] Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(72) [~~(71)~~] Medical director--A physician licensed by the Texas State Board of Medical Examiners, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(73) [~~(72)~~] Medical necessity (MN)--The determination that a recipient requires the services of licensed nurses in an institutional setting to carry out the physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute a medical need.

(74) [~~(73)~~] Medical necessity assessment--The process by which the applicant's or recipient's medical condition is evaluated to determine the need for nursing facility care based upon information supplied by the nursing facility.

(75) [~~(74)~~] Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(76) [~~(75)~~] Medical-social care plan--See Interdisciplinary Comprehensive Care Plan.

(77) [~~(76)~~] Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.

(78) [~~(77)~~] Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(79) [~~(78)~~] Minimum data set (MDS)--See Resident Assessment Instrument (RAI).

(80) [~~(79)~~] Misappropriation of funds--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(81) [~~(80)~~] Natural Death Act--Provisions of Texas Health and Safety Code, Chapter 672.

(82) [~~(81)~~] Neglect--A deprivation of life's necessities of food, water, or shelter, or a failure of an individual to provide services, treatment, or care to a resident which causes or could cause mental or physical injury, or harm or death to the resident.

(83) [~~(82)~~] NHIC--Formerly, this term referred to the National Heritage Insurance Corporation, which was the intermediary for the Texas Medicaid program; it now refers to the current intermediary for the Texas Medicaid program, the Texas Medicaid and Health Partnership.

(84) [~~(83)~~] Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.

(85) [~~(84)~~] Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing and/or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

(86) [~~(85)~~] Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.

(87) [~~(86)~~] Nurse practitioner--A person licensed by the Texas Board of Nurse Examiners (BNE) as a registered professional nurse, authorized by the BNE as an advanced practice nurse in the role of nurse practitioner.

(88) [~~(87)~~] Nurse reviewer--A registered professional nurse employed by HHSC to monitor the accuracy of the CARE form assessment data.

(89) [~~(88)~~] Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."

(90) [~~(89)~~] Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(91) [~~(90)~~] Nursing facility/home--An institution that provides organized and structured nursing care and service, and is subject to licensure under Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(92) [~~(91)~~] Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."

(93) [~~(92)~~] Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, orderlies, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(94) [~~(93)~~] Objectives--See definition of "goals."

(95) [~~(94)~~] OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform, as amended.

(96) [~~(95)~~] Ombudsman--An advocate who is a certified representative, staff member, or volunteer of the DADS Office of the State Long Term Care Ombudsman.

(97) [~~(96)~~] Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.

(98) [~~(97)~~] Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(99) [~~(98)~~] PASARR--Preadmission Screening and Resident Review.

(100) [~~(99)~~] Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(101) [~~(100)~~] Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(102) [~~(101)~~] Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(103) [~~(102)~~] Person with a disclosable interest--A person with a disclosable interest is any person who owns at least a 5.0% interest in any corporation, partnership, or other business entity that is required to be licensed under Health and Safety Code, Chapter 242. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the facility.

(104) [~~(103)~~] Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a physician, dentist, or podiatrist.

(105) [~~(104)~~] Physical restraint--See Restraints (physical).

(106) [~~(105)~~] Physician--A doctor of medicine or osteopathy currently licensed by the Texas State Board of Medical Examiners.

(107) [~~(106)~~] Physician assistant (PA)--

(A) A graduate of a physician assistant training program who is accredited by the Committee on Allied Health Education and Accreditation of the Council on Medical Education of the American Medical Association; or

(B) A person who has passed the examination given by the National Commission on Certification of Physician Assistants. According to federal requirements (42 CFR §491.2) a physician assistant is a person who meets the applicable state requirements governing the qualifications for assistant to primary care physicians, and who meets at least one of the following conditions:

(i) is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(ii) has satisfactorily completed a program for preparing physician assistants that:

(I) was at least one academic year in length;

(II) consisted of supervised clinical practice and at least four months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(III) was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(C) A person who has satisfactorily completed a formal educational program for preparing physician assistants who does not meet the requirements of paragraph (d)(2), 42 CFR §491.2, and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding July 14, 1978.

(108) [~~(107)~~] Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed by the Texas State Board of Podiatric Medical Examiners.

(109) [~~(108)~~] Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a physician, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(110) [~~(109)~~] Practitioner--A physician, podiatrist, dentist, or an advanced practice nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(111) [~~(110)~~] Preadmission medical necessity determination--The determination of need for nursing facility care before the individual's admission into the nursing facility. This determination is valid until admission into a nursing facility or up to 30 days from the effective date.

(112) [~~(111)~~] PRN (pro re nata)--As needed.

(113) [~~(112)~~] Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with DADS.

(114) [~~(113)~~] Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.

(115) [~~(114)~~] Qualified surveyor--An employee of DADS who has completed state and federal training on the survey process and passed a federal standardized exam.

(116) [~~(115)~~] Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(117) [~~(116)~~] Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by DADS who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of DADS' Regulatory Services Division.

(118) [~~(117)~~] Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(119) [~~(118)~~] Registered nurse (RN)--An individual currently licensed by the Board of Nurse Examiners for the State of Texas as a Registered Nurse in the State of Texas.

(120) [~~(119)~~] Reimbursement methodology--The method by which HHSC determines nursing facility per diem rates.

(121) [~~(120)~~] Remodeling--The construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems) or the conversion of space in a facility to a different use.

(122) [~~(121)~~] Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, including, but not limited to, routine maintenance, repairs, equipment replacement, painting.

(123) [~~(122)~~] Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(124) [~~(123)~~] Resident--Any individual residing in a nursing facility.

(125) [~~(124)~~] Resident assessment instrument (RAI)--An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U.S. Department of Health and Human Services. At a minimum, this instrument must consist of the Minimum Data Set (MDS) core elements as specified by the Centers for Medicare & Medicaid Services (CMS); utilization guidelines; and Resident Assessment Protocols (RAPS).

(126) Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(127) [~~(125)~~] Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(128) [~~(126)~~] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(129) [~~(127)~~] Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(130) [~~(128)~~] Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(131) [~~(129)~~] Seclusion--See the definition of "involuntary seclusion" in paragraph (1)(A) of this section.

(132) [~~(130)~~] Secretary--Secretary of the U.S. Department of Health and Human Services.

(133) [~~(131)~~] Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(134) [~~(132)~~] SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(135) [~~(133)~~] Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(136) [~~(134)~~] Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by Chapter 50 of the Human Resources Code and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by employment providing social services in a health care setting.

(137) [~~(135)~~] Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(138) [~~(136)~~] State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(139) [~~(137)~~] State survey agency--DADS is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(140) [~~(138)~~] Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas State Board of Medical Examiners to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of a nurse practitioner providing services in a nursing facility.

(141) [~~(139)~~] Supervision--General supervision, unless otherwise identified.

(142) [~~(140)~~] Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. If the person being supervised does not meet assistant-level qualifications specified

in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(143) [~~(141)~~] Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(144) [~~(142)~~] Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(145) [~~(143)~~] TDMHMR--Formerly, this term referred to the Texas Department of Mental Health and Mental Retardation; it now refers to DADS.

(146) [~~(144)~~] *Texas Register*--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The *Texas Register* was established by the Administrative Procedure and Texas Register Act of 1975.

(147) [~~(145)~~] Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(148) [~~(146)~~] Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(149) [~~(147)~~] Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(150) [~~(148)~~] TILE--Texas Index for Level of Effort; an index of 11 categories plus a default that consists of relative resource utilization groups. The index determines where a nursing facility client fits based upon service and care requirements. It determines the daily rate to be paid on behalf of the client.

(151) [~~(149)~~] TILE 202 restorative nursing--Nursing care and practices, based on a plan of care developed by the restorative team, designed to maintain or improve on goals achieved during physical or occupational therapy. Examples of TILE 202 restorative nursing include training and skill practice in self-feeding, bed mobility, transfers, ambulation, dressing or grooming, and active range of motion.

(152) [~~(150)~~] TILE error--Inaccuracies in a CARE form assessment of a Medicaid recipient that result in an incorrect TILE classification.

(153) [~~(151)~~] Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(154) [~~(152)~~] Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(155) [~~(153)~~] Title XVIII--Medicare provisions of the Social Security Act.

(156) [~~(154)~~] Title XIX--Medicaid provisions of the Social Security Act.

(157) [~~(155)~~] Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(158) [~~(156)~~] UAR--HHSC's Utilization and Assessment Review Section.

(159) [~~(157)~~] Uniform data set--See Resident Assessment Instrument (RAI).

(160) [~~(158)~~] Universal precautions--The use of barrier and other precautions by long-term care facility employees and/or contract agents to prevent the spread of blood-borne diseases.

(161) [~~(159)~~] Utilization review committee--The group of health care professionals contracted by HHSC to make individual determinations of medical necessity regarding nursing facility care. The Utilization Review Committee consists of physicians and registered nurses.

(162) [~~(160)~~] Vendor payment--Payment made by DADS on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's claim approval of the DADS-generated Nursing Facility Billing Statement to DADS. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(163) [~~(161)~~] Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §19.403

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445, which governs the authority of family councils and the responsibility of nursing facilities related to family councils.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and

Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445.

§19.403. Notice of Rights and Services.

(a) The facility must inform the resident, the resident's next of kin or guardian, both orally and in writing, in a language that the resident understands, of the resident's [~~his~~] rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. This notification must be made prior to or upon admission and during the resident's stay if changed.

(b) The facility must also inform the resident, upon admission and during the stay, in a language the resident understands, of the following:

(1) (No change.)

(2) a description of the protection of personal funds as described in §19.404 of this subchapter [~~title~~] (relating to Protection of Resident Funds);

(3) - (6) (No change.)

(c) Upon admission of a resident, a facility must:

(1) provide written information to the resident's family representative, in a language the representative understands, of the right to form a family council; and

(2) inform the resident's family representative, in writing, if a family council exists, of the council's meeting time, date, location and contact person.

(d) [~~(c)~~] Receipt of information in subsections (a) - (c) [~~(a) - (b)~~] of this section, and any amendments to it, must be acknowledged in writing by all parties receiving the information.

(e) [~~(d)~~] The facility must post a copy of the documents [~~each document~~] specified in subsections (a) - (b) of this section in a conspicuous location.

(f) [~~(e)~~] The resident or the resident's [~~his~~] legal representative has the following rights:

(1) upon an oral or written request to the facility, to access all records pertaining to the resident [~~himself~~], including clinical records, within 24 hours (excluding weekends and holidays); and

(2) after receipt of the resident's [~~his~~] records for inspection, to purchase photocopies of all or any portion of the records, at a cost not to exceed the community standard, upon request and two workdays advance notice to the facility.

(g) [~~(f)~~] The resident has the right to be fully informed in language the resident understands [~~that he can understand~~] of the resident's [~~his~~] total health status, including the resident's [~~but not limited to, his~~] medical condition.

(h) [~~(g)~~] The resident has the right to refuse treatment, to formulate an advance directive (as specified in §19.419 of this subchapter [~~title~~] (relating to Advance Directives [~~and Medical Powers of Attorney~~)]), and to refuse to participate in experimental research.

(1) If the resident refuses treatment, the resident [~~he~~] must be informed of the possible consequences.

(2) If the resident chooses to participate in experimental research, the resident [~~he~~] must be fully notified of the research and possible effects of the research. The research may be carried on only with the full written consent of the resident's physician, and the resident.

(3) Experimental research must comply with Federal Drug Administration regulations on human research as found in 45 Code of Federal Regulations, Part 4b, Subpart A.

(i) [~~(h)~~] The facility must inform a [~~each~~] resident before, or at the time of admission, and periodically during the resident's stay (if there are any changes), of services available in the facility and of charges for those services, including any charges for services not covered under Medicare or by the facility's per diem rate. Notice must be in writing, at least 30 days before [~~in advance of~~] the effective date of any changes in rates for services not covered by the current charge, or in Medicaid-certified facilities, by Medicaid.

(j) [~~(i)~~] The facility must provide [~~furnish~~] a written description of a resident's legal rights, which includes:

(1) a description of the manner of protecting personal funds, described in §19.404 of this subchapter [~~title (relating to Protection of Resident Funds)~~];

(2) a posting of names, addresses, and telephone numbers of all pertinent state client advocacy groups such as DADS, the state ombudsman program, the protection and advocacy network, and, in Medicaid-certified facilities, the Medicaid fraud control unit; and

(3) a statement that the resident may file a complaint with DADS concerning resident abuse, neglect, and misappropriation of resident property in the facility.

(k) [~~(j)~~] The facility must inform a [~~each~~] resident of the name, specialty, and way of contacting the physician responsible for the resident's [~~his~~] care.

(l) [~~(k)~~] Notification of changes.

(1) A facility must immediately inform the resident; consult with the resident's physician; and if known, notify the resident's legal representative or an interested family member when there is:

(A) an accident involving the resident that results in injury and has the potential for requiring physician intervention;

(B) a significant change in the resident's physical, mental, or psychosocial status (that is, a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) a need to alter treatment significantly (that is, a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) a decision to transfer or discharge the resident from the facility.

(2) The facility also must promptly notify the resident and, if known, the resident's legal representative or interested family member when there is:

(A) a change in room or roommate assignment as described in §19.701(4)(B) [~~§19.701(5)(B)~~] of this chapter [~~title~~] (relating to Quality of Life); or

(B) a change in resident rights under federal or state law or regulations as described in subsection (a) of this section.

(3) The facility must record and periodically update the address and phone number of the resident's family or legal representative, or a responsible party.

(m) [~~(l)~~] Additional requirements for Medicaid-certified facilities. Medicaid-certified facilities must:

(1) provide the resident with the state-developed notice of rights under §1919(e)(6) of the Social Security Act (see also §19.402 of this subchapter [~~title~~] (relating to Exercise of Rights));

(2) inform a [~~each~~] resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing facility or, when the resident becomes eligible for Medicaid of:

(A) the items and services that are included in nursing facility services provided under the State Plan and for which the resident may not be charged;

(B) those other items and services that the facility offers and for which the resident may be charged, and the amount of charges for those services;

(3) inform each resident when changes are made to the items and services specified in paragraphs (2)(A) and (2)(B) of this subsection;

(4) provide [~~furnish~~] a written description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment under §1924(c) of the Social Security Act, which:

(A) is used to determine the extent of a couple's nonexempt resources at the time of institutionalization; and

(B) attributes to the community spouse an equitable share of resources that cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in the [~~his~~] process of spending down to Medicaid eligibility levels; and

(5) prominently display in the facility written information, and provide to residents and potential residents oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive funds for previous payments covered by such benefits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER H. QUALITY OF LIFE

40 TAC §19.701, §19.706

STATUTORY AUTHORITY

The amendment and new section are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445, which governs the authority of family councils and the responsibility of nursing facilities related to family councils.

The amendment and new section implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445.

§19.701. Quality of Life.

A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. If children are admitted to a facility, care must be provided to meet their unique medical and developmental needs.

(1) Dignity. The facility must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of the resident's [~~his~~] individuality.

(2) Self-determination and participation. The resident has the right to:

(A) choose activities, schedules, and health care consistent with the resident's [~~his~~] interests, assessments, and plans of care;

(B) (No change.)

(C) make choices about aspects of the resident's [~~his~~] life in the facility that are significant to the resident [~~him~~].

[~~(3) Participation in resident and family groups.~~]

[~~(A) A resident has the right to organize and participate in resident groups in the facility.~~]

[~~(B) A resident's family has the right to meet in the facility with the families of other residents in the facility.~~]

[~~(C) The facility must provide a resident or family group, if one exists, with private space.~~]

[~~(D) Staff or visitors may attend meetings at the group's invitation.~~]

[~~(E) The facility must provide a designated staff person responsible for providing assistance and responding to written requests that result from group meetings.~~]

[~~(F) When a resident or family group exists, the facility must listen to the views and act upon the grievances and recommendations of residents and families concerning proposed policy and operational decisions affecting resident care and life in the facility.~~]

[~~(G) The facility must assist residents to attend meetings.~~]

(3) [~~(4)~~] Participation in other activities. A resident has the right to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.

(4) [~~(5)~~] Accommodation of needs. A resident has the right to:

(A) reside and receive services in the facility with reasonable accommodation of individual needs and preferences, except when the health or safety of the individual or other residents would be endangered; and

(B) receive notice before the resident's room or roommate in the facility is changed.

(5) [~~(6)~~] Accommodations for children. Pediatric residents should be matched with roommates of similar age and developmental levels.

§19.706. Resident Group and Family Council.

(a) A resident has the right to organize and participate in resident groups in a facility.

(b) A facility must assist residents who require assistance to attend resident group meetings.

(c) A resident's family has the right to meet in the facility with the families of other residents in the facility and organize a family council. A family council may:

(1) make recommendations to the facility proposing policy and operational decisions affecting resident care and quality of life; and

(2) promote educational programs and projects intended to promote the health and happiness of residents.

(d) If a resident group or family council exists, a facility must:

(1) listen to and consider the views and act upon the grievances and recommendations of residents and families concerning proposed policy and operational decisions affecting resident care and life in the facility;

(2) provide a resident group or family council with private space;

(3) provide a designated staff person responsible for providing assistance and responding to written requests that result from resident group and family council meetings; and

(4) allow staff or visitors to attend meetings at the resident group's or family council's invitation.

(e) If a family council exists, a facility must:

(1) upon written request, allow the family council to meet in a common meeting room of the facility at least once a month during hours mutually agreed upon by the family council and the facility;

(2) provide the family council with adequate space on a prominent bulletin board to post notices and other information;

(3) designate a staff person to act as the family council's liaison to the facility;

(4) respond in writing to written requests by the family council within five working days;

(5) include information about the existence of the family council in a mailing that occurs at least semiannually; and

(6) permit a representative of the family council to discuss concerns with an individual conducting an inspection or survey of the facility.

(f) Unless the resident objects, a family council member may authorize, in writing, another member to visit and observe a resident represented by the authorizing member.

(g) A facility must not limit the rights of a resident, a resident's family member, or a family council member to meet with an outside person, including:

(1) an employee of the facility during the employee's nonworking hours if the employee agrees; or

(2) a member of a nonprofit or government organization.

(h) A facility must not:

(1) terminate an existing family council;

(2) prevent or interfere with the family council from receiving outside correspondence addressed to the family council or open family council mail; or

(3) willfully interfere with the formation, maintenance, or operation of a family council, including interfering by:

(A) denying a family council the opportunity to accept help from an outside person;

(B) discriminating or retaliating against a family council participant; or

(C) willfully scheduling events in conflict with previously scheduled family council meetings, if the facility has other scheduling options.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 3, 2008.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER U. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §19.2004

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445, which governs the authority of family councils and the responsibility of nursing facilities related to family councils.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§242.901 - 242.906 and §242.0445.

§19.2004. Determinations and Actions Pursuant to Inspections.

(a) DADS determines [~~The Texas Department of Human Services (DHS) will determine~~] if a facility meets the licensing rules, including both physical plant and facility operation requirements.

(b) (No change.)

(c) At the conclusion of an inspection, survey, or investigation, the violations will be discussed in an exit conference with the facility's management. A written list of the violations will be left with the facility at the time of the exit conference; any additional violation that may be determined during review of field notes or preparation of the official final list will be communicated to the facility in writing within 10 working days after [~~of~~] the exit conference. DADS gives [~~DHS will give~~] the facility an additional exit conference regarding the additional violations.

(d) Not later than the fifth working day after the date a facility receives the final statement of violations under this section, the facility must provide a copy of the statement to a representative of the facility's family council.

(e) [~~(d)~~] Within 10 working days after receipt of the final statement of violations, the facility must [~~Upon receipt of the final statement of violations, the facility will have 10 working days to~~] submit an acceptable plan of correction to the regional director, except plans of correction under §19.2112(i) of this chapter [~~title~~] (relating to Administrative Penalties). An acceptable plan of correction must address the following areas:

(1) how corrective action will be accomplished for those residents affected by the violations [~~violation(s)~~];

(2) how the facility will identify other residents with the potential to be affected by the same violations [~~violation(s)~~];

(3) what measures will be put into place or systemic changes made to ensure the violations [~~violation(s)~~] will not recur;

(4) how the facility will monitor its corrective actions to ensure that the violations [~~violation(s)~~] are being corrected and will not recur; and

(5) [~~include dates~~] when corrective action will be completed.

(f) [~~(e)~~] A clear and concise summary in nontechnical language of each licensure inspection or complaint investigation will be provided by DADS [~~DHS~~] at the time the report of contact or similar document is provided.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.208, concerning renewal procedures and qualifications; §19.214, concerning criteria for denying a license or renewal of a license; and §19.2112, concerning administrative penalties; in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the amendments is to comply with some of the provisions of Senate Bill (SB) 1318, 80th Legislature, 2007, which amended the Texas Health and Safety Code, Chapter 242. Health and Safety Code, §242.066 was amended to allow DADS to assess an administrative penalty against a person who fails to notify DADS of a change of ownership prior to the effective date of the change.

The proposal also updates terminology and state agency names and corrects rule cross-references to ensure that the rule reflects changes resulting from the consolidation of health and human services agencies in 2004 and updates the sections to make them consistent with other DADS rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.208 states that a license holder must pay the required license fee upon submission of the renewal application. The amendment also updates agency names and rule cross-references.

The proposed amendment to §19.214 updates terminology and agency names, and corrects rule cross-references.

The proposed amendment to §19.2112 provides that an administrative penalty may be assessed if DADS is not notified of a change of ownership before the effective date of the change and sets the amount of this penalty. Agency names and rule cross-references are also updated in the amended section.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments are in effect is an estimated increase in revenue of $4,014 in fiscal year (FY) 2008; $12,042 in FY 2009; $12,042 in FY 2010; $12,042 in FY 2011; and $12,042 in FY 2012.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there may be an adverse economic effect on small businesses as a result of enforcing or administering the amendments because the rule allows DADS to assess an administrative penalty against nursing facilities that fail to notify DADS of a change of ownership before the effective date of the change of ownership.

DADS estimates that the number of small businesses subject to the proposed amendments is significantly less than 980. This estimate is based on DADS records, which indicate that of the 1117 licensed nursing facilities, approximately 980 of them are formed for the purpose of making a profit, one of the requirements for being a "small business." DADS does not have specific data regarding number of employees and gross receipts to determine what percentage of these facilities are operated by an entity that would meet the definition of a "small business." DADS estimates that there are no micro-businesses subject to the proposed amendments.

The potential economic impact for a small business is a $500 administrative penalty, but that penalty is incurred only if the small business fails to notify DADS of a change of ownership in accordance with the proposed amendments. For that reason, DADS projects that there will be minimal economic impact to small businesses subject to these amendments.

Several regulatory options were considered in determining how to achieve the purpose of the proposed rule. Statute gives DADS the option of assessing an administrative penalty if a nursing fa-

cility does not comply with rules related to notice of change of ownership. Therefore, DADS considered not imposing an administrative penalty against a facility that does not comply with the proposed rules. DADS did not consider this option consistent with its responsibility as a regulatory agency and, specifically, determined that this option would not adequately address its need to have up-to-date information regarding facility ownership. DADS currently assesses a wide range of administrative penalties and DADS also considered the use of a penalty as low as $100 to minimize the adverse economic impact on small businesses. DADS determined, however, that imposition of a penalty lower than $500 would not be effective in encouraging compliance with the rule by facilities of any size. Finally, DADS considered the use of graduated penalties based on facility size, but determined that implementation of such a system would have additional administrative costs associated with it that outweigh the benefits of such a system, especially since a small business can avoid the penalty all together by providing notice of a change of ownership in accordance with the rule.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS' rules will be in compliance with state law.

Ms. Durden anticipates that there may be an economic cost of up to $500 to persons who are required to comply with the amendments because they allow DADS to assess an administrative penalty against a nursing facility for failure to notify DADS of a change of ownership in accordance with the rule. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-022, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 022" in the subject line.

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.208, §19.214

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendments implement Texas Government Code, §531.0055, Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §242.066.

§19.208. Renewal Procedures and Qualifications.

(a) (No change.)

(b) Each license holder must, at least 45 days before the expiration of the current license, file an application for renewal with DADS [~~the Texas Department of Human Services (DHS)~~]. DADS [~~DHS~~] considers that an individual has filed a timely and sufficient application for the renewal of a license if the license holder submits:

(1) a complete application to DADS [~~DHS~~], and DADS [~~DHS~~] receives the complete application at least 45 days before the current license expires;

(2) an incomplete application to DADS [~~DHS~~] with a letter explaining the circumstances which prevented the inclusion of the missing information, and DADS [~~DHS~~] receives the incomplete application and letter at least 45 days before the current license expires; or

(3) a complete application to DADS [~~DHS~~], DADS [~~DHS~~] receives the application during the 45-day period ending on the date the current license expires, and the individual pays a $500 administrative penalty.

(c) If the application is postmarked by the filing deadline, the application will be considered to be timely if received in DADS Regulatory Services, [~~the~~] Licensing and Credentialing Section [~~of the state office of Long-Term Care-Regulatory, Texas Department of Human Services~~], within 15 days after [~~of~~] the postmark.

(d) The appropriate license fee must be paid upon submission of the renewal application [~~The application for renewal must contain the same information required for an original application as well as payment of the licensing fees~~].

(e) The renewal of a license may be denied for the same reasons an original application for a license may be denied. See §19.214 of this subchapter [~~title~~] (relating to Criteria for Denying a License or Renewal of a License).

§19.214. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if an applicant, or any person required to submit background and qualification information:

(1) does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DADS at a minimum may consider:

(A) - (E) (No change.)

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(f) of this

subchapter [~~title~~] (relating to Criteria for Licensing) has been affiliated with during the last five years; and

(G) (No change.)

(2) has committed any act described in §19.2112(a)(2) - (7) [~~§19.2112(a)(2) - (6)~~] of this chapter [~~title~~] (relating to Administrative Penalties);

(3) - (5) (No change.)

(6) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §19.216 of this subchapter [~~title~~] (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year after [~~from~~] the date on which the funds were received by the trustee in accordance with the provisions of §19.2116(e) and (f) of this chapter [~~title~~] (relating to Involuntary Appointment of a Trustee); or

(C) (No change.)

(7) discloses any of the following actions within the five-year period preceding the application:

(A) operation of a facility that has been decertified or [~~and/or~~] had its contract canceled under the Medicare or Medicaid program in any state or both;

(B) - (I) (No change.)

(8) fails to meet minimum standards of financial condition as described in §19.201(e)(2)(A) of this chapter [~~title~~] and §19.1925(a) of this chapter [~~title~~] (relating to Financial Condition); or

(9) fails to notify DADS of a significant adverse change in financial condition as required under §19.1925[~~(b)~~] of this chapter [~~title~~].

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800050
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER V. ENFORCEMENT
DIVISION 2. LICENSING REMEDIES

40 TAC §19.2112

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§19.2112. Administrative Penalties.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may assess an administrative penalty against a person who:

(1) (No change.)

(2) makes a false statement, that the person knows or should know is false, of a material fact:

(A) on an application for issuance or renewal of a license or in an attachment to the application; or

(B) with respect to a matter under investigation by DADS [~~DHS~~];

(3) refuses to allow a representative of DADS [~~DHS~~] to inspect:

(A) - (B) (No change.)

(4) willfully interferes with the work of a representative of DADS [~~DHS~~] or the enforcement of this chapter;

(5) willfully interferes with a representative of DADS [~~DHS~~] preserving evidence of a violation of a rule, standard, or order adopted or license issued under Chapter 242, Health and Safety Code;[~~.~~]

(6) fails to pay a penalty assessed by DADS [~~DHS~~] under Chapter [~~chapter~~] 242, Health and Safety Code by the 10th day after the date the assessment of the penalty becomes final; or[~~.~~]

(7) fails to notify DADS of a change of ownership before the effective date of the change of ownership.

(b) The persons against whom DADS [~~DHS~~] may impose an administrative penalty include:

(1) - (4) (No change.)

(c) DADS [~~DHS~~] recognizes the limited immunity from civil liability granted to volunteers serving as officers, directors or trustees of charitable organizations, under the Charitable Immunity and Liability Act of 1987 (Texas Civil Practice and Remedies Code, Chapter 84).

(d) In determining whether a violation warrants an administrative penalty, DADS [~~DHS~~] considers the facility's history of compliance and whether:

(1) - (4) (No change.)

(5) the violation is of a type established elsewhere in DADS [~~DHS's~~] rules concerning licensing standards for long term care facilities.

(e) In determining the amount of the penalty, DADS [~~DHS~~] considers at a minimum:

(1) - (5) (No change.)

(f) Administrative penalties may be levied for each violation found in a single survey. Each day of a continuing violation constitutes a separate violation. The administrative penalties for each day of a continuing violation cease on the date the violation is corrected. A violation that is the subject of a penalty is presumed to continue on each successive day until it is corrected. The date of correction alleged by the facility in its written plan of correction will be presumed to be the

actual date of correction unless it is later determined by DADS [~~DHS~~] that the correction was not made by that date or was not satisfactory.

(1) Table of administrative penalties. The following table contains the gradations of penalties in accordance with the relative seriousness of the violation. While the table addresses most administrative penalty situations, administrative penalties for unique circumstances to which the table does not apply are established elsewhere in the requirements. The amount of the administrative penalty listed in subsection (a)(7) of this section is $500.
Figure: 40 TAC §19.2112(f)(1)

(2) (No change.)

(g) The penalties for a violation of the requirement to post notice of the suspension of admissions, additional reporting requirements found at §19.601(a) of this chapter [~~title~~] (relating to Resident Behavior and Facility Practice), or residents' rights cannot exceed $1,000 a day for each violation, unless the violation of a resident's right also violates a rule in Subchapter H of this chapter (relating to Quality of Life), or Subchapter J of this chapter (relating to Quality of Care).

(h) (No change.)

(i) DADS [~~DHS~~] may issue a preliminary report regarding an administrative penalty. Within 10 days of the issuance of the preliminary report, DADS [~~DHS~~] will give the facility written notice of the recommendation for an administrative penalty. The notice will include:

(1) - (2) (No change.)

(3) a statement of whether the violation is subject to correction under §19.2114 of this subchapter [~~title~~] (relating to Right to Correct) and if the violation is subject to correction, a statement of:

(A) the date on which the facility must file a plan of correction (POC) to be approved by DADS [~~DHS~~]; and

(B) (No change.)

(4) (No change.)

(j) Within 20 days after the date on which written notice of recommended assessment of a penalty is sent to a facility, the facility must give DADS [~~DHS~~] written consent to the penalty, make a written request for a hearing, or if the violation is subject to correction, submit a plan of correction in accordance with §19.2114 of this subchapter [~~title~~] (relating to Right to Correct). If the facility does not make a response within the 20-day period, DADS [~~DHS~~] will assess the penalty.

(k) The procedures for notification of recommended assessment, opportunity for hearing, actual assessment, payment of penalty, judicial review, and remittance will be in accordance with Health and Safety Code, §§242.067 - 242.069. Hearings will be held in accordance with Health and Human Services Commission's rules at 1 TAC, Chapter 357, Subchapter I [~~DHS's formal hearing procedures in Chapter 79 of this title (relating to Legal Services)~~]. Interest on penalties is governed by Health and Safety Code §242.069(g).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200800051
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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SUBCHAPTER AA. VENDOR PAYMENT

40 TAC §19.2614

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §19.2614, concerning customized power wheelchairs, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the new section is to allow a nursing facility to procure a customized power wheelchair (CPWC) for a Medicaid-eligible nursing facility resident. The nursing facility must purchase the CPWC if the need for the CPWC is identified and the nursing facility can receive reimbursement through a DADS prior approval reimbursement system. CPWCs have been available to a Medicaid-eligible nursing facility resident with personal funds as an incurred medical expense.

The addition of CPWCs as a service in the nursing facility Medicaid program is a provision of the settlement agreement in the lawsuit filed in federal court against HHSC and DADS entitled *LeCompte, et al. v. Hawkins, et al.*, which was settled effective June 29, 2007. The federal Centers for Medicare and Medicaid Services (CMS) has approved a Medicaid state plan amendment to add this service to the nursing facility Medicaid program.

SECTION-BY-SECTION SUMMARY

The proposed new §19.2614 adds the requirements that a nursing facility must follow to obtain reimbursement from DADS for purchasing a CPWC for a Medicaid-eligible resident. Upon request by the resident or the resident's legal representative, the nursing facility must procure an evaluation of the resident, by a licensed occupational or physical therapist, for a CPWC. The new section also requires the nursing facility to obtain prior authorization from HHSC, or its designee, before purchasing the CPWC. The nursing facility and resident will be notified in writing whether the prior authorization request was denied or approved. The resident can request a Medicaid fair hearing if HHSC or its designee denies a prior authorization request. After receiving prior approval, the nursing facility must purchase the CPWC. The nursing facility must seek alternative funding sources to pay for the CPWC before requesting a reimbursement from DADS. If the nursing facility fails to obtain prior authorization or submit the necessary documentation to HHSC or its designee, the nursing facility is responsible for the cost of the CPWC. The new section also specifies that the CPWC is the personal property of the resident, usable only by the resident, and transferable to the resident's estate if death occurs. The nursing facility is responsible for repair and maintenance of the CPWC.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new section is in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed new section is in effect is an estimated additional cost of $664,477 in fiscal year (FY) 2008; $672,910 in FY 2009; $522,769 in FY 2010; $535,838 in FY 2011; and $549,234 in FY 2012.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the new section, because the nursing facility will be able to obtain reimbursement for the CPWC if the required documentation and assessments are provided to and approved by HHSC or its designee.

PUBLIC BENEFIT AND COSTS

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the new section is in effect, the public benefit expected as a result of enforcing the new section is Medicaid-eligible individuals will now have access to CPWCs to aid their mobility and independence. Historically, CPWCs were only available with personal funds or as an incurred medical expense. Making CPWCs available to qualified nursing facility residents will allow access to this benefit by a much larger percentage of the nursing facility population.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the new section. The new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Geri Willems at (512) 438-3159 in DADS' Provider Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-018, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 018" in the subject line.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The new section affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§19.2614. Customized Power Wheelchairs.

(a) Customized power wheelchairs (CPWCs) are a service in the nursing facility Medicaid program for Medicaid-eligible nursing facility residents when medically necessary and prior authorized by the Health and Human Services Commission (HHSC) or its designee.

(b) A CPWC is a wheelchair that consists of a power mobility base and customized seating system.

(1) The power mobility base may include programmable electronics and may utilize alternate input devices.

(2) The wheelchair must be medically necessary, adapted, and fabricated to meet the individualized needs of the resident, and intended for the exclusive and ongoing use of the resident.

(3) Components of the customized seating system must be in part or entirely usable only by the resident for whom the power wheelchair is adapted and fabricated.

(c) When requested by a resident or the resident's legal representative, the nursing facility must procure an evaluation for a CPWC from a licensed physical or occupational therapist. If the evaluation recommends a CPWC, the nursing facility must submit all required forms to HHSC or its designee for prior authorization.

(d) After receiving prior authorization from HHSC or its designee, the facility must purchase the CPWC.

(e) To be eligible for reimbursement, the nursing facility must request and receive prior authorization from HHSC or its designee before purchasing a CPWC. The prior authorization request must include:

(1) a completed CPWC order form;

(2) an occupational or physical therapy evaluation of the resident;

(3) a statement signed by the resident's attending physician that the CPWC is medically necessary; and

(4) a detailed breakdown of proposed CPWC specifications from the customized power wheelchair supplier.

(f) To be eligible for reimbursement for a CPWC, the nursing facility must obtain an evaluation of the resident by an occupational or physical therapist licensed in the state of Texas prior to purchase of the CPWC. The occupational or physical therapy evaluation must include:

(1) a diagnosis relevant to the need for a CPWC;

(2) the specific CPWC and adaptations being recommended;

(3) a description of how the CPWC will meet the specific needs of the resident;

(4) a description of specific training needs for use of this device including training needs of the resident, nursing facility staff, and family (when applicable); and

(5) written documentation from the therapist indicating that the resident is physically and cognitively capable of independently managing a power wheelchair.

(g) Payment for physical or occupational therapy evaluations may be obtained for eligible residents in the same manner as payment for physical or occupational therapy evaluations is obtained in the Specialized and Rehabilitative Services programs, as described in §19.1306 of this chapter (relating to Payment for Specialized and Rehabilitative Services).

(h) Following a review of the prior authorization request by HHSC or its designee, the nursing facility and resident will receive a written approval or denial of the request. If the request is approved, the nursing facility will promptly make arrangements to purchase the CPWC. If the request is denied, HHSC or its designee will send a notice of denial to the nursing facility resident informing the resident of the right to request a Medicaid fair hearing in accordance with 1 TAC Chapter 357, Subchapter A.

(i) A facility must submit the request for reimbursement to DADS within one year after the date of purchase of the CPWC. If DADS denies a request for reimbursement because the facility failed to obtain prior authorization or submit the necessary documentation for the CPWC to HHSC or its designee, the facility is responsible for the cost of the CPWC and may not charge the cost to the resident or family.

(j) A facility must fully explore and use other funding sources to pay for a CPWC before submitting the request for reimbursement to DADS. If another funding source will pay for part of the CPWC expense, the facility may request reimbursement for the balance if the requirements in subsections (d) - (f) of this section are met. If another funding source is available, DADS reimburses only up to the remaining balance after other sources are fully utilized.

(k) Only the resident can use the CPWC, and it must be identified as the personal property of the resident.

(l) The resident's comprehensive care plan must document that the CPWC is medically necessary.

(m) Upon discharge from the facility, the resident retains the CPWC. If the resident dies, the CPWC becomes property of the resident's estate. As part of the estate, the CPWC is subject to all applicable Medicaid Estate Recovery Program (MERP) requirements, as detailed in 1 TAC Chapter 373. If the CPWC is donated or sold to the facility by the resident or executor of the resident's estate, the transaction must be documented in accordance with §19.416 of this chapter (relating to Personal Property).

(n) As required by §19.2601(b)(8)(C) of this chapter (relating to Vendor Payment (Items and Services Included)), the nursing facility is required to maintain and repair all medically necessary equipment for its residents, including CPWCs obtained under this section.

(o) Requests for replacement of a CPWC must be submitted in the same manner as the original prior authorization of the CPWC outlined in this section. A replacement CPWC may be requested no earlier than five years after the original date of purchase, unless the request includes an order from the prescribing physician familiar with the resident and an assessment by a physician or a licensed occupational or physical therapist with documentation supporting why the current CPWC no longer meets the resident's needs. DADS does not authorize replacement in situations where the CPWC has been abused or neglected.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800048
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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CHAPTER 94. NURSE AIDES

40 TAC §94.2, 94.3, 94.9 - 94.11

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §94.2, concerning definitions; §94.3, concerning nurse aide training and competency evaluation program (NATCEP) requirements; §94.9, concerning waiver, reciprocity, and exemption requirements; §94.10, concerning registry, findings, and inquiries; and §94.11, concerning requirements for recertification, in Chapter 94, Nurse Aides.

BACKGROUND AND PURPOSE

The purpose of the amendments is to allow the Nurse Aide Registry to deem a nurse aide to be unemployable based on a finding that the nurse aide is listed as unemployable in the Employee Misconduct Registry.

DADS manages the Employee Misconduct Registry in accordance with Texas Health and Safety Code, Chapter 253, and the Nurse Aide Registry in accordance with Texas Health and Safety Code, Chapter 250. The Employee Misconduct Registry is a state registry that maintains a record of unlicensed employees of facilities licensed by DADS and adult foster care providers who have engaged in misconduct. The Nurse Aide Registry is a federally mandated registry that maintains records regarding the status of individuals who have received nurse aide certification, including whether the person has committed abuse, neglect, or misappropriation. Facilities and agencies licensed by DADS, certain contracted providers, and state schools consult both registries for the purpose of determining employability of an applicant, but a person listed on the Employee Misconduct Registry is not necessarily designated as unemployable in the Nurse Aide Registry. The proposal will allow DADS to designate a nurse aide as unemployable on the Nurse Aide Registry if the nurse aide is listed on the Employee Misconduct Registry.

The proposal also updates terminology and state agency names and corrects rule cross-references to ensure that the rule reflects changes resulting from the consolidation of health and human services agencies in 2004 and updates the sections to make them consistent with other DADS rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §94.2 updates references to DADS and the Texas Board of Nursing.

The proposed amendment to §94.3 adds language to §94.3(k)(2) - (3) stating that the NATCEP must ensure that trainees are not listed as unemployable on the Employee Misconduct Registry and have not been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006. The amendment also updates references to DADS.

The proposed amendment to §94.9 adds language to §94.9(a) - (c) requiring that certain nurse aides who are being deemed competent and are being placed on the Nurse Aide Registry as employable by waiver of the requirements must also not be listed as unemployable on the Employee Misconduct Registry and not have been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006, in order to be placed on the Nurse Aide Registry as employable.

The proposed amendment to §94.10 adds language in §94.10(l) stating that if a nurse aide has a finding of abuse, neglect, or misappropriation and is listed as unemployable in the Employee Misconduct Registry, DADS will enter the finding in the Nurse

Aide Registry. The amendment also adds language stating that the due process procedure offered to an individual prior to a finding being entered in the Employee Misconduct Registry satisfies the due process for placement of the individual's name in the Nurse Aide Registry.

The proposed amendment to §94.11 amends §94.11(b) to state that a person who has been removed from active status on the Nurse Aide Registry must successfully complete a new competency evaluation program or a new NATCEP to be restored to active status. The amendment also adds §94.11(c) and §94.11(d) to state that a nurse aide for whom a finding of abuse, neglect or misappropriation is listed in either the Nurse Aide Registry or Employee Misconduct Registry or has been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006, will not be recertified.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the amendments increase coordination between the Employee Misconduct Registry and Nurse Aide Registry.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is the enhancement of DADS' ability to protect the public by preventing individuals found to be unemployable under the Employee Misconduct Registry rules from maintaining a nurse aide certification.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jennifer Morrison at (512) 438-4624 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-008, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 008" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§94.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (3) (No change.)

(4) Competency evaluation program (CEP)--A skills examination and a written or oral examination approved by DADS [~~the Texas Department of Human Services (DHS)~~].

(5) Curriculum--The publication titled *Texas Curriculum for Nurse Aides in Long Term Care Facilities* developed by DADS [~~DHS~~].

(6) DADS--The Texas Department of Aging and Disability Services.

(7) [~~(6)~~] DHS--Formerly, this referred to the Texas Department of Human Services; it now refers to DADS, unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they are now the responsibility of the Texas Health and Human Services Commission (HHSC).

(8) [~~(7)~~] Direct supervision--Actual observation of students performing tasks in a nurse aide training and competency evaluation program (NATCEP).

(9) [~~(8)~~] Entity--An educational institution, organization of any kind, facility or division thereof, or licensed nursing facility that does not participate in Medicare, Medicaid, or dually participating facility (Medicare and Medicaid).

(10) [~~(9)~~] Examination--A CEP or the competency evaluation portion of a training and competency evaluation program.

(11) [~~(10)~~] Facility--A nursing facility (Medicaid only), skilled nursing facility (Medicare), or dually participating nursing facility (Medicaid and Medicare).

(12) [~~(11)~~] Facility-based program--NATCEP offered by or in a facility.

(13) [~~(12)~~] General supervision--The provision of necessary guidance and ultimate responsibility for the NATCEP.

(14) [~~(13)~~] Licensed health professional--A:

(A) physician;

(B) physician assistant;

(C) nurse practitioner;

(D) physical, speech, or occupational therapist;

(E) physical or occupational therapy assistant;

(F) registered professional nurse;

(G) licensed vocational nurse; or

(H) certified social worker.

(15) [~~(14)~~] Licensed nurse--A registered nurse or licensed vocational nurse.

(16) [~~(15)~~] Licensed vocational nurse (LVN)--An individual currently licensed by the Texas Board of Nursing [~~Vocational Nurse Examiners~~] to practice as a licensed vocational nurse.

(17) [~~(16)~~] Misappropriation of resident property--The deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent.

(18) [~~(17)~~] Neglect--The failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

(19) [~~(18)~~] Non-facility-based program--A NATCEP not offered by or in a facility.

(20) [~~(19)~~] Nurse aide--An individual providing nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse who has successfully completed a NATCEP approved by the state or has been determined competent by waiver or reciprocity and is listed as active on the [~~DHS~~] Nurse Aide Registry. This definition does not include an individual who is a licensed health professional or a registered dietitian or who volunteers such services without monetary compensation.

(21) [~~(20)~~] Nurse Aide Registry--Also referred to as the registry, a state listing of all individuals who have satisfactorily completed a NATCEP or a CEP approved by DADS [~~DHS~~] or qualified by waiver or reciprocity and are deemed active and employable in a nursing facility. Nurse aides who have a finding entered on the registry of committing an act of abuse, neglect, or misappropriation of resident or consumer property are deemed unemployable in a nursing facility pursuant to 42 CFR, §483.156.

(22) [~~(21)~~] Nurse aide training and competency evaluation program (NATCEP)--A program approved by DADS [~~DHS~~] to train and evaluate an individual's ability to act in the capacity of a nurse aide for the purpose of working in a nursing facility.

(23) [~~(22)~~] Nursing facility--An institution that participates in the Medicaid program or dually participates in both Medicaid and Medicare programs as defined in the Social Security Act, §1919(a), 42 United States Code Annotated §1396r.

(24) [~~(23)~~] Nursing services--Services provided by nursing personnel that include, but are not limited to:

(A) promotion and maintenance of health;

(B) prevention of illness and disability;

(C) management of health care during acute and chronic phases of illness;

(D) guidance and counseling of individuals and families; and

(E) referral to other health care providers and community resources when appropriate.

(25) [~~(24)~~] Official forms--The forms required and provided by DADS [~~DHS~~] or its designees.

(26) [~~(25)~~] Performance record--An evaluation of the trainee's performance of major duties and skills taught by the program.

(27) [~~(26)~~] Program--A nurse aide training and competency evaluation program (NATCEP).

(28) [~~(27)~~] Program director--An individual approved by DADS [~~DHS~~] to provide general supervision of a NATCEP in accordance with §94.5 of this title (relating to Program Director, Program Instructor, Supplemental Trainers, and Skills Examiner Requirements).

(29) [~~(28)~~] Program instructor--An individual approved by DADS [~~DHS~~] who is responsible for conducting the training in a NATCEP and meets the requirements in §94.5 of this title.

(30) [~~(29)~~] Registered nurse (RN)--An individual currently licensed by the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~] to practice professional nursing.

(31) [~~(30)~~] Resident--A person accepted for care or residing in a facility.

(32) [~~(31)~~] Skilled nursing facility--A nursing facility or distinct part of a facility that participates in the Medicare program as defined in the Social Security Act, §1819(a), 42 United States Code Annotated §1395i-3.

(33) [~~(32)~~] Skills examiner--A qualified individual responsible for conducting the competency evaluation portion of a NATCEP in accordance with §94.5 of this title.

(34) [~~(33)~~] Supplemental trainers--Licensed health professionals who are qualified to participate in teaching a program in accordance with §94.5 of this title.

(35) [~~(34)~~] Trainee--An individual who is enrolled and attending, but has not completed a program.

§94.3. Nurse Aide Training and Competency Evaluation Program (NATCEP) Requirements.

(a) (No change.)

(b) A person or entity that desires to offer a NATCEP must file a complete application for approval on official forms prescribed by DADS [~~DHS~~].

(c) - (f) (No change.)

(g) DADS [~~DHS~~] will not approve a NATCEP offered by or in a facility if, within the previous two years, the facility:

(1) - (7) (No change.)

(h) (No change.)

(i) Each NATCEP must teach the curriculum established by DADS [~~DHS~~], and as described in the Code of Federal Regulations, Title 42, §483.152, to include at least 16 introductory hours of training in the following areas before any direct contact with a resident:

(1) - (5) (No change.)

(6) basic nursing skills, including:

(A) - (E) (No change.)

(7) personal care skills, including [~~but not limited to~~]:

(A) - (H) (No change.)

(8) mental health and social service needs, including:

(A) - (E) (No change.)

(9) care of cognitively impaired residents, including:

(A) - (E) (No change.)

(10) basic restorative services, including:

(A) - (F) (No change.)

(11) resident's rights, including:

(A) - (G) (No change.)

(j) A NATCEP must have a DADS-approved [~~DHS-approved~~] program director and program instructor at the time of initial approval and during the time training occurs who meet the requirements of §94.5(a) and (b) of this title (relating to Program Director, Program Instructor, Supplemental Trainers, and Skills Examiner Requirements).

(k) A NATCEP must ensure that trainees:

(1) (No change.)

(2) are not listed as unemployable on the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253;

(3) have not been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006;

(4) [~~(2)~~] complete at least the first 16 hours of training (Section I of the curriculum) before any direct contact with a resident;

(5) [~~(3)~~] do not perform any services for which they have not been trained and have been found to be proficient by an instructor;

(6) [~~(4)~~] are under the direct supervision of a licensed nurse when performing skills on individuals as part of a NATCEP;

(7) [~~(5)~~] are under the general supervision of a licensed nurse when providing services to a resident; and

(8) [~~(6)~~] are clearly identified as trainees during the clinical training.

(l) A NATCEP must notify DADS [~~DHS~~] of any change in the information presented in an approved application, including a change in program director or program instructor. DADS [~~DHS~~] must approve such changes before the effective date of the change. DADS [~~DHS~~] will conduct a review of the program if it determines the changes are substantive.

(m) Each NATCEP must use a DADS [~~DHS~~] performance record to account for major duties or skills taught, trainee performance of duty or skill, satisfactory or unsatisfactory performance, and name of instructor supervising the performance. At the completion of the NATCEP, the trainee and his or her employer, if applicable, will receive a copy of the performance record.

(n) The NATCEP must maintain records that must be available to DADS [~~DHS~~] or its designees at any reasonable time, which include for each new session of the NATCEP:

(1) - (4) (No change.)

(o) - (q) (No change.)

(r) DADS [~~DHS~~] must approve a NATCEP before operation or solicitation or enrollment of trainees.

(s) DADS [~~DHS~~] approval of a NATCEP covers only approval of the required DADS [~~DHS~~] curriculum and hours and should not be considered approval of additional content or hours.

(t) (No change.)

§94.9. Waiver, Reciprocity, and Exemption Requirements.

(a) A nurse aide will be deemed competent and placed on the Nurse Aide Registry by waiver of the requirements if the individual:

(1) (No change.)

(2) verifies employment as a nurse aide who performed nursing or nursing-related services for monetary compensation at least every two years since July 1, 1989; [~~and~~]

(3) is not listed as unemployable on the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253;

(4) has not been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006; and

(5) [~~(3)~~] completes the documentation required by DADS [~~DHS~~].

(b) A nurse aide who is listed in active status on a registry in another state will be placed on the Nurse Aide Registry by reciprocity if:

(1) the state nurse aide registry in question is in compliance with the Act; [~~and~~]

(2) the individual is not listed as unemployable on the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253;

(3) the individual has not been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006; and

(4) [~~(2)~~] the individual completes the required [~~DHS~~] documentation.

(c) An individual will be eligible to take the CEP with an exemption from training if the individual:

(1) (No change.)

(2) is not listed as unemployable on the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253;

(3) has not been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006;

(4) [~~(2)~~] submits documentation required [~~by DHS~~] to verify eligibility to take the CEP;

(5) [~~(3)~~] arranges for a facility or NATCEP to serve as an examination site; and

(6) [~~(4)~~] provides the original [~~DHS~~] letter of approval to take the CEP to the skills examiner before taking the examination.

§94.10. Registry, Findings, and Inquiries.

(a) Each individual listed on the registry will keep DADS [~~DHS~~] informed of his or her current address and telephone number.

(b) Nurse aide certification expires 24 months after being added to the Nurse Aide Registry or after the last date of verified employment. To maintain active Nurse Aide Registry status, the following requirements must be met:

(1) Facilities must submit a DADS [~~DHS~~] form to DADS [~~DHS~~] annually to document all nurse aides who are performing or have performed paid nursing or nursing-related services at the facility during the past year.

(2) A nurse aide must submit a DADS [~~DHS~~] form to DADS [~~DHS~~] to document that the nurse aide has performed paid nursing or nursing-related services, unless documentation was submitted by the facility or facilities at which he or she was employed.

(c) DADS [~~DHS~~] reviews and investigates allegations of abuse, neglect, or misappropriation of resident property by a nurse aide employed in a facility. If there is a finding of an alleged act of abuse, neglect, or misappropriation of resident property by a nurse aide, before entry of the finding on the Nurse Aide Registry, DADS [~~DHS~~] will provide the nurse aide an opportunity to demonstrate compliance with the law through an informal reconsideration and a formal hearing as provided in 1 TAC Chapter 357 (relating to Hearings) [~~Chapter 79, Subchapter Q, of this title (relating to Formal Appeals)~~] and 42 Code of Federal Regulations, §488.335.

(d) Informal reconsideration procedures are:

(1) DADS [~~DHS~~] will provide notice to the nurse aide of the facts or conduct alleged to warrant the proposed finding and the nurse aide's right to an informal reconsideration to show compliance with the law for the retention of his or her certificate;

(2) the nurse aide may submit a written request for an informal reconsideration to the local Regulatory Services [~~Long Term Care-Regulatory~~] office within 10 calendar days after [~~of~~] the date of receipt of DADS' [~~DHS's~~] notice.

(3) This informal reconsideration will be limited to a review of documentation submitted by the nurse aide and information DADS [~~DHS~~] used as the basis for its proposed finding and will not be conducted as an adversary hearing.

(4) DADS [~~DHS~~] will give the nurse aide a written affirmation or reversal of the proposed finding.

(5) If DADS [~~DHS~~] does not reverse the finding or the nurse aide fails to attend the scheduled informal reconsideration, a notice of adverse action and right to a formal hearing is sent to the nurse aide.

(e) A nurse aide may request a formal hearing within 30 days after [~~from~~] receipt of DADS' [~~DHS's~~] notice of adverse action in accordance with 1 TAC Chapter 357 [~~Chapter 79, Subchapter Q, of this title~~].

(1) If the nurse aide fails to request a hearing, DADS [~~DHS~~] will enter the finding on the Nurse Aide Registry.

(2) If the nurse aide or representative fails to appear at the scheduled hearing, the Administrative Law Judge may sustain DADS' [~~DHS's~~] finding and DADS [~~DHS~~] will enter the finding on the Nurse Aide Registry.

(3) If a hearing is conducted and the finding of an alleged act of abuse, neglect, or misappropriation of resident property is upheld:

(A) the nurse aide will be informed of the final decision within 120 days after [~~from~~] the date the request was received by DADS [~~DHS~~]; and

(B) DADS [~~DHS~~] will enter the finding on the Nurse Aide Registry.

(f) If an alleged act of abuse, neglect, or misappropriation of resident property by a nurse aide, who also is a permitted medication aide under Chapter 95 of this title (relating to Medication Aides--Program Requirements), violates the sections in this chapter and Chapter 95 of this title, DADS [~~DHS~~] must comply with the formal hearing procedures as required in subsection (e) of this section. Determinations are made through the formal hearing on both the certificate of nurse aide practice and the permit for medication aide practice.

(g) DADS [~~DHS~~] will not make a finding that an individual has neglected a resident if the individual demonstrates the neglect was caused by factors beyond the individual's control.

(h) - (j) (No change.)

(k) In the case of inquiries to the Nurse Aide Registry, DADS [~~DHS~~] must:

(1) - (3) (No change.)

(l) If a nurse aide has a finding of abuse, neglect, or misappropriation and is listed as unemployable in the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253, DADS enters that finding in the Nurse Aide Registry. The due process procedure offered to an individual before a finding is entered in the Employee Misconduct Registry satisfies the due process required for listing the individual as unemployable in the Nurse Aide Registry. DADS does not provide the nurse aide with an informal review or a formal hearing, as described in subsections (c) - (e) of this section.

§94.11. Requirements for Recertification.

(a) (No change.)

(b) A [~~For a~~] person who has been removed from active status on the Nurse Aide Registry must successfully complete a new CEP or a new NATCEP to be restored to active status. [~~placed back on the Nurse Aide Registry as active, one of the following actions must be taken:~~]

[~~(1) successful completion of a new CEP; or~~]

[~~(2) successful completion of a new NATCEP.~~]

(c) DADS does not recertify a nurse aide for whom a finding of abuse, neglect, or misappropriation is listed in either the Nurse Aide Registry or the Employee Misconduct Registry established pursuant to Texas Health and Safety Code, Chapter 253.

(d) DADS does not recertify a nurse aide who has been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800047
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 8. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

The Texas Department of Transportation (department) proposes the repeal of §8.138, Temporary Cardboard Tags, §8.139, Metal Dealer License Plates and Temporary Cardboard Tags, §8.140, Established and Permanent Place of Business, and §8.146, Metal Converter's License Plates and Temporary Cardboard Tags, and new §8.138, Use of Metal Dealer License Plates, §8.139, Metal Dealer Plate Allocation, §8.140, Established and Permanent Place of Business, §8.146, Metal Converter's License Plates, §8.150, Authorization to Issue Temporary Tags, §8.151, Temporary Tags, General Use Requirements, and Prohibitions, §8.152, Obtaining Numbers for Issuance of Temporary Tags, §8.153, Specifications for All Temporary Tags, §8.154, Dealer Temporary Tags, §8.155, Buyer's Temporary Tags, §8.156, Buyer's Temporary Tag Receipt and Notice to Buyer, §8.157, Advance Numbers, Internet-down Buyer's Temporary Tags, §8.158, Advance Numbers, Emergency Buyer's Temporary Tags, §8.159, General Requirements and Allocation of Internet-down and Emergency Buyer's Tag Numbers, and §8.160, Converter's Temporary Tags, all concerning general distinguishing numbers.

EXPLANATION OF REPEALS AND PROPOSED NEW SECTIONS

Article 8 of Senate Bill 11 and Senate Bill 1786, 80th Legislature, Regular Session, 2007, require the department to create and maintain databases that allow for real time access to owner information on recently sold vehicles or vehicles operated under other temporary tags. The system must be capable of generating a vehicle-specific number for the issuance of dealer, buyer's, and converter temporary tags. The department must adopt rules and implement procedures for the generation of the vehicle-specific numbered temporary tags by dealers and converters, advance issuance of emergency tags to dealers for use when internet access is unavailable at the time of sale, display of temporary tags on vehicles by dealers, converters, and buyers, and the provision of information by dealers to buyers on the use of temporary tags, associated criminal penalties, actions required of buyers concerning temporary tags, and other information as determined by the department concerning the purchase and registration of vehicles. It is necessary to propose the repeal of existing §8.138, Temporary Cardboard Tags; §8.139, Metal Dealer License Plates and Temporary Cardboard Tags; §8.140, Established and Permanent Place of Business; and §8.146, Metal Converter's License Plates and Temporary Cardboard Tags and simultaneously propose new sections for a data-based temporary tag issuance system as mandated by Senate Bill 11 and Senate Bill 1786.

Implementation of SB 11 and SB 1786 will require significant changes in the design, format, and method of issuing dealer and buyer's temporary tags. A dealer will provide the state with information about a vehicle and buyer, and the department will provide a specific number to be used on the temporary tag. The number on the temporary tag will greatly enhance law enforcement efforts to ascertain the true owners of vehicles prior to permanent registration.

New provisions set out additional premises requirements for dealers who file applications after May 1, 2008. A majority of the additional requirements are minimal. For example, dealership premises must have features such as electricity and a 100-square foot office. Existing dealers generally meet these standards. Other new provisions address safety issues, recognize new technology, and provide a small amount of consumer protection. The new section will raise industry standards and give legitimate dealers a better chance of competing with persons who would use a general distinguishing number license for convenience or to mask unlawful activities.

New §8.138, Use of Metal Dealer License Plates, and §8.139, Metal Dealer Plate Allocation, reorganizes and incorporates portions of existing §8.138 with only minor non-substantive changes. The changes clarify existing provisions and remove unnecessary language. Existing §8.139(a), relating to plate attachment to rear license plate holder and keeping of receipts in vehicles; §8.139(c), relating to prohibited usage of metal plates; §8.139(e), relating to usage on types of vehicles for which the dealer is licensed; and §8.139(i) - (j), relating to metal plate records and void plates, are reenacted in the new section. New §8.139 reenacts existing §8.138(n) relating to metal dealer's plate allocation.

A portion of existing §8.138(a) is not reenacted. Currently, the section requires dealers to remove and safeguard unvalidated multi-year license plates when placing a dealer plate on a vehicle and to put them back on the vehicle when the dealer plate is removed. Transportation Code, §502.451, enacted by House Bill 310, 80th Legislature, Regular Session, 2007, now requires dealers to remove license plates and registration insignia when they acquire a vehicle. Therefore, the provisions relating to multi-year license plates in existing §8.138(a) are no longer applicable.

Existing §8.140 contains premises and office standards for retail dealers and wholesale dealers. The current rule is confusing and difficult for retail dealers and wholesale dealers to easily understand the different standards that apply to their types of businesses. Proposed new §8.140 segregates the differing standards for retail and wholesale dealers and identifies those provisions that are applicable to both retail and wholesale dealers or applicable to only retail dealers. The new format is more comprehensible and contains additional descriptions to clarify some standards.

New §8.140(1), Business hours for retail dealers, incorporates existing requirements with only minor non-substantive changes. The changes delete unnecessary language making the section easier to read and understand. Specifically, existing §8.140(1)(A) provisions relating to posting and maintaining office hours for retail dealers and the existing §8.140(1)(B) provisions relating to having the telephone answered between 8:00 a.m. and 5:00 p.m. weekdays are contained in this paragraph. The restructuring allows a retail dealer to more easily identify the business hours and telephone requirements that apply specifically to a retail dealer.

New §8.140(2), Business hours for wholesale dealers, contains a new requirement that wholesale dealers must have the telephone answered by a bona fide employee, answering machine, or answering service during the hours of 8:00 a.m. and 5:00 p.m. on weekdays. In addition, wholesale dealers must now be at the licensed location for two consecutive hours at least two days a week instead of one day a week. The new requirements will help ensure that wholesale dealers are available at their place of business to meet with other dealers and department personnel as may be necessary. The remainder of the section incorporates existing §8.140(1)(G) provisions relating to posting and maintaining office hours for wholesale dealers and §8.140(1)(B) provisions relating to having the telephone answered between 8:00 a.m. and 5:00 p.m. weekdays. The restructuring allows a wholesale dealer to more easily identify the business hours and telephone requirements that apply specifically to a wholesale dealer.

New §8.140(3), Business sign requirements for retail dealers, incorporates existing §8.140(2) provisions relating to a retail dealer's signage. New language clarifies existing standards, by expressly stating that temporary signs or banners are not acceptable and that the sign must be permanently mounted and readable from the street. The sign must display the business name or assumed name under which the dealer conducts business as reflected on the dealer's license. It is acceptable to omit terms such "Inc.," "LLC," "LP" or similar identifiers of the business entity.

New §8.140(4), Business sign requirements for wholesale dealers, incorporates the existing §8.140(2) provisions relating to wholesale dealer's signage. New language sets out existing standards, by clarifying that temporary signs or banners are not acceptable, and that the sign must be permanently mounted. The sign must display the business name or assumed name under which the dealer conducts business as reflected on the dealer's license. It is acceptable to omit terms such "Inc.," "LLC," "LP" or similar identifiers of the business entity. Additional clarification is made that the sign may be on the main door to the dealer's office, the side of the building where the wholesale dealer is located, or other location on the business property. If the business sign is on or beside the main door to the dealer's office two inch high lettering is acceptable.

New office structure requirements in §8.140(5), Office structure for retail and wholesale dealers, apply to dealers that file applications for new license or a supplemental location after May 1, 2008. Dealers licensed before that date are not required to upgrade their premises to meet additional standards. The department has determined that new requirements should only apply to future new license applicants who could better incorporate any economic impact in making the initial decision of applying for a license.

New §8.140(5) incorporates existing §8.140(1)(B) - (C) provisions relating to definition of the building structure and the requirements for zoning compliance, use of portable buildings, and physical business address recognized by the U.S. Postal Service. Changes clarify that portable structures are still acceptable, provided that the structure is not a readily movable trailer or vehicle.

A new requirement is that internal office space must be not less than 100 square feet with a minimum seven foot ceiling. Other new provisions require electricity with adequate heating and lighting. It is not acceptable to locate a dealership office in a storeroom, closet, stock room, or other room that is not open to the public. New requirements prohibit offices located in a room within a residence, apartment house, motel, hotel, or rooming house. A vehicle purchase is one of the largest investments made by most consumers. The public is entitled to transact business in a professional setting. It is inappropriate to require the public to enter or approach a personal dwelling to conduct such a transaction. For health and safety reasons, the route to a dealership office may not pass through a food preparation area. This paragraph establishes the minimum structural standard necessary for a dealer's office to adequately and effectively serve the needs of the consumer.

New §8.140(6), Required office equipment for retail and wholesale dealers, incorporates existing §8.140(1)(B) provisions related to office furniture and telephones and further specifies that dealers must have a desk, two chairs, a file cabinet, Internet access, a printer, a fax machine, and a land based, business listed, working telephone. The new requirements for Internet access, printer, and fax machine recognize the changes in technology in the business environment. In addition, Senate Bill 1786 and article 8 of Senate Bill 11, 80th Legislature, Regular Session, 2007, require dealers to have Internet access to interact with the temporary tag database.

New §8.140(7), Number of retail dealers in one office, and §8.140(8), Number of wholesale dealers in one office, incorporate without change the existing §8.140(1)(B) and (F) provisions relating to the allowable number of retail and wholesale dealers in one office. New §8.140(9), Wholesale and retail dealers office sharing prohibition, incorporates the existing §8.140(1)(D) and (E) provisions relating to dealers conducting business in offices with other businesses. The restructuring allows retail and wholesale dealers to more easily identify the requirements related to the number of dealers in a single location that apply specifically to a retail or wholesale dealer and clearly states that the two entities cannot be located in the same structure if either of the entities were established after 1999. This language is in the current version of §8.140(1), relating to office requirements, however clarification was needed.

New §8.140(10), Dealer housed with other business, incorporates the existing §8.140(3) provisions relating to the display space requirements. Further clarifying information related to permanent barriers, signage, and the use of additional space when the designated display area is full is provided. The clarifications establish standards for barriers and signage at locations where other businesses are operated so that the dealer's operations are clearly distinguishable by consumers from the other businesses operated at that location. This subsection will prevent consumer confusion with the other businesses and establish the separate relationship between the motor vehicle transaction and those other businesses.

New §8.140(11), Display area requirements, requires outside lighting if a dealership is open after sundown. This paragraph also requires that if a dealer's premises include gasoline pumps or another business that sells gasoline, the display areas may not be part of the parking area for gasoline customers and may not interfere with access to gasoline pumps. Display space may not contain a fuel fill port or fire prevention access to fuel tanks. The creation of the lighting requirement and segregation from fuel storage areas provide additional safety for consumers. The lighting requirement also allows the consumer to make more informed choices when purchasing motor vehicles from dealers by allowing a better opportunity to examine the vehicle if shopping after dark.

New §8.140(12), Dealer with salvage dealer license, provides that dealers who also hold a salvage dealer's license must mark all salvage vehicles on the premises with signage informing potential buyers that the vehicles are salvage. This identification will enable the consumer to more easily identify a salvage vehicle from a non-salvage vehicle at the salvage dealer's facility.

New §8.140(13), Lease requirements, incorporates existing §8.140(4) provisions relating to lease requirements and further provides that the lease must be in effect for the term of the current license. This provision helps assure operations will remain at the dealer's licensed location throughout the term of the license.

New §8.140(14), Dealer must display license, incorporates existing §8.140(5) provisions relating to the display of the dealer's license. This allows a consumer to see that the consumer is doing business with a licensed dealer.

New §8.146, Metal Converter's License Plates, reorganizes and incorporates portions of existing §8.146 with only minor non-substantive changes to improve the language of the rule. Existing §8.146(a), relating to plate attachment to rear license plate holder; §8.146(h), relating to usage on types of vehicles for which the converter is licensed; and existing §8.146(l) - (o), relating to metal plate records and void plates are reenacted in this new section.

New §8.150, Authorization to Issue Temporary Tags, states that licensed dealers and converters are authorized to issue temporary tags applicable to their businesses. Authorization to issue tags in connection with day-to-day business operations is assured until a license is cancelled, revoked, or suspended. However, because advance Internet-down and emergency numbers are more vulnerable to misuse, theft, and counterfeiting, a dealer's authorization to obtain these types of numbers in advance may be separately modified, suspended, or revoked after an opportunity for hearing.

New §8.151, Temporary Tags, General Use Requirements, and Prohibitions, requires all temporary tags to be displayed in the rear license plate holder of the vehicle, eliminating the option of rear window display. Transportation Code, §502.451, enacted by House Bill 310, 80th Legislature, Regular Session, 2007, now requires dealers to remove license plates and registration insignia when they acquire vehicles, making the license plate holders available for use. A temporary tag displayed in a tinted rear window is often difficult to see. It is vital that law enforcement officers be able to view the tag easily now that they can access the database and obtain identifying information about the owner of a vehicle in real time. The remaining portions of §8.150 incorporate existing requirements with only minor non-substantive changes to make the section easier to read and understand.

New §8.152, Obtaining Numbers for Issuance of Temporary Tags, requires dealers and converters to have Internet access to obtain a specific number for each tag from the temporary tag databases maintained by the department. Dealers and converters are required to enter information into the databases and obtain a number before a temporary tag may be issued and displayed on a vehicle. The only permissible exceptions are contained in §8.155 and §8.156, relating to obtaining advance numbers in the event that Internet connectivity is down or power and communications are disrupted for more than two days. Senate Bill 11 and Senate Bill 1786 require that licensees connect to the databases through the Internet. It is necessary that all dealers and converters have an Internet connection to do so.

New §8.153, Specifications for All Temporary Tags, describes the specifications and acceptable methods for issuance of temporary tags using the specific number obtained from the state databases.

The department will no longer require temporary buyer's or converter tags to be red, blue, or orange. Information printed or completed on all tags must be in black ink. This will facilitate issuance of a tag using a computer and printer and will reduce costs to dealers and converters who previously were required to have temporary tags printed in color.

This new section describes four acceptable methods for issuing temporary tags. The database will provide the specific number and other information required to be displayed on the tag via an image of a sample tag, which will demonstrate how a properly completed tag should look.

The current system of manually placing information on pre-printed cardboard stock using a black marking pen or other means remains an option. In addition, the department will allow a licensee the option of printing the image of the sample tag onto plain paper or a label and securing it to a piece of cardboard. Another option is that the licensee may print a plain paper image of the sample tag and display it in a clear plastic bag to protect it from the elements. All plain paper tags, regardless of whether they are glued or taped to cardboard, must be placed in a clear poly bag or a 2" strip of tape must be placed over the specific number portion of the tag.

It is reasonable to assume that some dealers may wish to use this image rather than copy the information onto a cardboard tag. Copying the required information onto the tag to make it useful to law enforcement will become tedious for many large-volume dealers who make numerous sales. Having to buy cardboard tags pre-printed with blank boxes to fill in does not decrease the dealer's cost of buying a printed tag and increases labor costs. Most importantly for law enforcement purposes, the likelihood of errors in the transference of information and numbers from the printed receipt to the cardboard tag is apt to occur too often. Therefore, it is in the best interest of law enforcement, dealers, and the department to facilitate the use of the provided sample paper image in a manner that is both efficient and acceptable to all concerned. It is good public policy to acknowledge the practical business necessity by allowing the sample image to suffice for the temporary tag. To do otherwise would increase costs to consumers.

If a dealer or converter chooses to manually complete and issue preprinted cardboard temporary tags, those tags must comply with the standards for format and display as indicated in the applicable appendices A - 1 through C - 1. The standards for the weight of the cardboard and bolt holes are unchanged.

Dealers and converters must begin using the new tags on the date that the database system is made generally available for use by the department. The department will provide the dealer access to the database for review at least 60 days before the requirement to use the system for the issuance of temporary tags. The department wants to give all dealers an opportunity to study the new system if they choose, however, it is necessary to have a specific statewide implementation date. Having a specific date that all dealers must be in compliance with the new system will limit the time that dual systems for issuing temporary tags exist. This will also benefit law enforcement and consumers by allowing them to become familiar with the appearance of the new tags. The department will notify the dealers through the Texas Register, department's website, and dealer associations of the dates that the system is available for review and the date that all dealers must begin to use the new system.

New §8.154, Dealer Temporary Tags, describes permissible usage of dealer temporary tags in demonstrating vehicles to prospective buyers, providing loaned vehicles to charitable organizations, operating vehicles in parades, road testing, and conveying untitled vehicles to a place of service or repair, to another place of business, or from a delivery point to a dealer's place of business. Holders of wholesale motor vehicle auction general distinguishing numbers may use temporary tags in transporting vehicles to or from a licensed auction location by that licensee's employees. Prohibited usage is established for laden commercial vehicles, dealer service or work vehicles, and personal use vehicles. These permissive and prohibited usages incorporate provisions of existing §8.138(b)(1), Appendix A - 2,

§8.139(c), and §8.139(l) without change. Existing §8.139(e) is incorporated without change by providing that dealers may use temporary tags only for the type of vehicles for which the dealer is licensed. Existing §8.139(g) provisions that temporary dealer tags are to be removed from a vehicle when an unregistered vehicle is sold to another dealer, that temporary buyer's tags may be issued, and that consigned vehicles are to display the temporary tag of the dealer to which it is consigned are also incorporated into the new rule.

New requirements are that temporary dealer tags are to have an expiration date not to exceed 60 days from the date of issuance. The temporary tag may be issued to a specific vehicle or to a specific agent of a dealer. A tag for a specific vehicle must display the vehicle-specific number from the state database, the year and make of the vehicle, the vehicle identification number, and the month, day, and year of expiration. Tags issued to dealer employees or agents must display the agent-specific number from the database, the name of the authorized employee or agent, and the month, day, and year of expiration.

Temporary dealer tags are primarily used to demonstrate vehicles to prospective buyers or convey vehicles to and from auctions and repair shops. Dealers generally sell a vehicle within 60 days, and a longer time period is not necessary. In addition, a dealer is able to reissue the dealer temporary tag at the end of the 60-day period should a longer period be needed.

New §8.155, Buyer's Temporary Tags, sets out requirements for a temporary buyer's tag. Certain existing requirements are unchanged. A buyer's temporary tag is not to be displayed on any street-operated vehicle unless that vehicle is actually sold. Temporary buyer's tags are valid for a period not to exceed 21 calendar days from the date the vehicle is sold. Supplemental buyer's tags are authorized when a dealer is unable to obtain documents in possession of a lienholder that are necessary to transfer title. Information required to be placed on buyer's tags is unchanged, except for the addition of the vehicle-specific number obtained from the state database.

Amendments to Transportation Code, §503.063(a) now require dealers to place a temporary buyer's tag on any vehicle sold. New §8.155(b) clarifies that dealers are required to do so and sets out an exception for wholesale transactions if the purchasing dealer places its own dealer tag on the vehicle. The exception recognizes standard business practices in the industry. Buyer's tags serve as temporary authorization to operate a vehicle on the public streets until a dealer titles and registers the vehicle in the name of the retail buyer. Vehicles in dealer-to-dealer transactions are not titled or registered in the name of the purchasing dealer.

Amendments to Transportation Code, §503.063(g) now state that a supplemental buyer's tag may be issued after 20 working days after the date of the issuance of the original buyer's tag, which under Transportation Code, §503.063(b) is valid for 21 calendar days. The result is that retail customers would be without valid tags for approximately one week. To resolve the conflict, the department will require dealers to renew the vehicle-specific number previously issued for the buyer's tag, on a supplemental buyer's tag, within 20 working days of the date of sale.

New §8.156, Buyer's Temporary Tag Receipt and Notice to Buyer, implements new Transportation Code, §503.0632, requiring dealers to provide notice to buyers of the applicable law and possible penalties relating to buyer's temporary tags. Dealers must provide to each buyer a temporary tag receipt for each tag containing specific sales and tag related information and are required to instruct the buyers to keep a copy of the receipt in the vehicle. The buyer must sign a copy of the receipt and the dealer must keep a copy of the signed receipt in the dealer's records. The receipt will include an acknowledgment that the buyer received all the required buyer's notices.

New §8.157, Advance Numbers, Internet-Down Buyer's Temporary Tags, implements new Transportation Code, §503.0631(d). Dealers are entitled to obtain an advance supply of numbers from the database to use if the dealer cannot access the Internet at the time of a sale. Dealers are further required to enter required information into the database not later than the next business day after the sale.

New §8.158, Advance Numbers, Emergency Buyer's Temporary Tags, implements new Transportation Code, §503.063(f), which requires the department to ensure that a dealer may generate a one-week supply of advance numbers to use if Internet access is disrupted in the event of an emergency. The department defines an emergency as a natural disaster that affects power and communications to a dealership for more than two days. Dealers must enter the required information into the database within 24 hours after the time that the power or Internet connectivity is restored.

New §8.159, General Requirements and Allocation of Internet-down and Emergency Buyer's Tag Numbers, describes general requirements for safekeeping and expiration of advance numbers and how many advance numbers a dealer may obtain for each type of number. Because advance numbers are not associated with a specific vehicle or buyer, they are more vulnerable to misuse and theft. Therefore, advance numbers are to be kept in a secure, locked place and dealers must report any loss, theft, or destruction of the numbers within 24 hours of that event.

Advance numbers will be allocated to dealers based on a percentage of their annual sales, which will be determined by the dealer's annual Vehicle Inventory Tax filings.

Advance numbers will expire 12 months after the date of issue. To ensure that dealers have an adequate supply of advance numbers, dealers may obtain additional advance numbers as they use them or the numbers expire.

If Internet access is unavailable, dealers are required to enter the information into the database not later than the next business day. The amount of advance Internet-down numbers would be one days' worth of a dealer's annual sales or approximately .002 percent (.002%). This figure is not practical for application to such a diverse dealer body as that in Texas. The department has determined that a reasonable amount of advance Internet-down numbers should be one percent (1%) of a dealer's total annual sales, with a minimum of one advance number. Since new license applicants have no sales history upon which to calculate an initial allotment of advance numbers, the department has set initial allotments and provided a means for a dealer to request more advance numbers based on monthly sales history. Dealers who purchase an existing dealership or relocate may rely on the sales history of the previous license to obtain advance numbers.

If a dealer's power or Internet connectivity is disrupted because of an emergency, the statute requires that dealers have a week's worth of emergency advance numbers. The department has determined that a reasonable amount of emergency advance numbers is 1/52 of a dealer's total annual sales, with a minimum of one advance number. To calculate an initial allotment of ad-

vance numbers, the department has set initial allotments and provided a means for a dealer to request more advance numbers based on monthly sales history. Dealers who purchase an existing dealership or relocate may rely on the sales history of the previous license to obtain advance numbers.

New §8.160, Converter's Temporary Tags, describes permissible usage of converter's temporary tags in demonstrating vehicles to prospective buyers, road testing, and conveying vehicles to a place of service or repair, to another place of business, or from a delivery point to a converter's place of business. These provisions incorporate sections of existing §8.146(c) - (f), and (h) - (i) without change. New requirements are that temporary converter's tags are to have an expiration date not to exceed 60 days from date of issuance. The temporary tag may be issued to a specific vehicle or to a specific agent of the converter. A tag for a specific vehicle must display the vehicle-specific number from the state database, the year and make of the vehicle, the vehicle identification number, and the month, day, and year of expiration. Tags issued to converter employees or agents must display the agent-specific number from the database, the name of the authorized employee or agent, and the month, day, and year of expiration.

Temporary converter tags are primarily used to demonstrate vehicles to prospective buyers or convey vehicles to and from auctions and repair shops. If a converter needs a longer time period, the converter will be able to reissue the temporary tag at the end of 60 days.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Brett Bray, Director, Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT

Mr. Bray has also determined that for each year of the first five years the repeals and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new sections will be implementation of SB 11 and SB 1786 and a clearer understanding by the public and the motor vehicle industry of the issuance process and permissible use of temporary tags by dealers, converters, and buyers. Further public benefits will be improved safety for law enforcement officers and a reduction in the number of fraudulent or forged temporary tags in circulation. There are minimal anticipated economic costs for persons required to comply with the sections as proposed regarding the new premise requirements.

There will be a minimal economic impact on small business required to comply with §8.140 of these rules. Government Code, §2006.002 requires that, before adopting a rule that may have an adverse economic effect on small businesses, a state agency prepare an economic impact statement and a regulatory flexibility analysis.

Any costs related to changes in §§8.138, 8.139, 8.146 and 8.150 - 8.160 are the result of the enactment of Senate Bill 1786 and article 8 of Senate Bill 11, and not the result of the adoption, enforcement, or administration of the proposed amendments, thus do not require an analysis under Government Code, Chapter 2006.

The statute defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. A "micro-business" is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. The department does not maintain data of a nature that would allow the categorization of a particular licensee under Government Code, Chapter 2006; however, the nature of the motor vehicle industry would indicate that nearly all 2,767 franchised licensees and 14,154 independent licensees would be categorized as small businesses since the determining factor would be fewer than 100 employees or less than $6 million in gross receipts. A relatively small percentage of licensees would meet the more than $6 million in gross receipts with more than 100 employees standard required not to be classified as a "small business." The overwhelming majority of licensees would have 20 or fewer employees and would be categorized as "micro-businesses." For the purposes of this impact statement and flexibility analysis, the distinction between "small business" and "micro-business" under Government Code, Chapter 2006 does not matter.

Changes to §8.140 relating to office structure affect only new licensees who obtain their licenses after May 1, 2008. For fiscal year 2007, there were 264 new franchised dealers and 2,135 new independent dealers. These changes do not affect the existing 2,767 franchised dealers and 14,154 independent dealers and any who obtain a license prior to May 1, 2008. It is anticipated that when the changes become effective, approximately 200 new licensees each month will be affected by the changes applicable to all licensees.

New §8.140(2) requires wholesale dealer licensees to have personnel present at the licensed location for two hours on two different days instead of the present requirement of two hours, one day per week. Since there are currently 270 wholesale dealer licensees, the department estimates 6 to 7 new wholesale dealers will be licensed each month, all of which might be considered a small business under the statutory guidelines. The manner that the wholesale dealer licensee chooses to meet the additional two hour requirement will determine the economic impact. The owner of the dealership could choose to be present for those two additional hours thereby costing the value of two hours of the owner's time, for which the department cannot estimate a cost, or the owner could use a minimum wage employee. The monthly additional costs for a minimum wage employee, including taxes and required insurances, to meet this additional time requirement would be less than $76 a month. This amount was determined by using the minimum wage plus employer taxes and unemployment insurance x 8.6 hours/month. Actual monthly costs between the effective date of this rule and July 2009 will increase from $60.87 to $75.44 due to the increase in the minimum wage from $5.85 to $7.25 and may vary due to the actual tax and insurance rate applicable to a particular employer.

New §8.140(5) establishes that an office have at least 100 square feet with a seven foot ceiling and electricity with adequate heating and cooling. Under the current rule, an office is to be of sufficient size to allow for a desk, chairs, file cabinet, and the usual office equipment. The department believes that

the square footage standard does not change the current rule since placing a desk, chairs, file cabinet, and the usual office equipment would require at a minimum 100 square feet for a usable office space. The seven foot ceiling requirement does not impose a stringent economic burden since the standard ceiling height for any type of building structure designed for human occupation is over seven feet. The requirement for electricity is partly a function of the statutorily mandated requirement for an Internet connection and the need for a power source for adequate heating and cooling. Adequate utilities and adequate heating and cooling are required by municipalities to obtain certificates of occupancy and meet local fire and health codes for a building to be used as a business open to the public. The current rule restricts the location of an office in a residence so the clarification that restrictions apply to such residences as apartment houses, motels, hotels, or rooming houses would not create an economic impact. The prohibition on using a storeroom, closet, stock room, or other room not open to the public as an office does not impose a new requirement since the current rule requires the office to be open to the public. Since any change from current rules relating to structures apply only to new licensees, local fire, health, safety, and building codes as well as the federal Americans with Disabilities Act provisions impose stricter standards than those required by the department. As a result of these local and federal standards, there would probably be no additional economic impact created by the proposed changes. However, for the purposes of full disclosure of the possible economic impact of the structural requirements imposed by this proposed rule, a metal portable building would meet the standards required under this rule at a cost of approximately $1,000 excluding electrical connections. Costs associated with a metal portable structure with electrical connections would include (1) costs of the portable structure - approximately $850, including shipping; (2) costs of portable heater and fan - approximately $100; and (3) costs of electrical pole placement, meter placement, and building wiring with labor - approximately $1,000 to $2,000 depending on electric utility company.

New §8.140(6) incorporates existing rules relating to office furniture and telephones with the addition of Internet access, a printer, and a fax machine. The Internet access requirement is the result of the enactment of Senate Bill 1786 and article 8 of Senate Bill 11, and not the result of the adoption, enforcement, or administration of the proposed amendments, thus does not require an analysis under Government Code, Chapter 2006. A fax machine and a printer have become the usual office equipment one finds in a modern business, and it would be unusual for a licensee to operate its business without them. As a result, it is unlikely that there would be an economic impact in requiring a fax machine and printer. In the event that a licensee needed to obtain either item to meet this new requirement, the economic impact for that licensee would be the initial capital cost of purchasing a fax machine or a printer. In today's market a basic fax machine can be purchased for less than $100 and a printer can be purchased for less than $200.

New §8.140(11) clarifies provisions relating to the display space requirements and further clarifies permanent barriers, signage, and the use of additional space when the designated display area is full. The clarifications establish standards for barriers and signage at locations where other businesses are operated so that the dealer's operations are clearly identifiable by consumers from the other businesses operated at that location. The department has been enforcing the current rule to require these standards. Therefore, these clarifications put into the plain language of the rule the interpretation of the current rule, and do not impose any additional requirements.

A prohibition on display areas being located in the parking area for gasoline customer sales or in areas for fuel fill ports or fire prevention access to fuel tanks is created. This requirement addresses existing local fire codes and insurance requirements and does not create an additional economic impact on the dealer.

In addition, if a licensee chooses to operate after sundown, a requirement for outside lighting is created. The economic impact of the lighting requirement is very speculative since this proposed requirement only applies to licensees who choose to operate after dark and will vary widely with the design of the licensee's facility. The possible economic impact of requiring a lit display area is estimated at less than $1,500. A typical single fixture commercial grade light with metal pole and concrete foundation, which are common to mall parking lots, costs approximately $1,500 to install. There are other alternatives that could be less expensive depending on the layout of the licensee's facility. For example, in cases where there are existing structures or poles, there are many flood lighting fixture alternatives under $300.

New §8.140(12) requires dealers who also hold salvage dealer licenses to mark salvage vehicles with signage indicating a salvage vehicle to distinguish the vehicles from non-salvage vehicles. The economic impact is dependent on the signage used to mark each vehicle and the number of salvage vehicles. Generally, a photocopied sign costing less than five cents per vehicle could be used.

The department estimates that the cost of all the new structural premise requirements will be between $2,600 and $4,800. There will also be an ongoing cost of $912 per year to have the business office open an additional 2 hours per day.

Since a majority of the regulated dealers are considered small businesses under the statute, the department considered several alternative methods for achieving the purposes of these rules during the proposal process. The department considered not adopting any changes to §8.140, but determined that it was useful to amend this section to clarify the requirements for an established and permanent place of business, to update the requirements to reflect new technology, to provide to consumers better identification of salvage vehicles when purchasing any vehicle from a salvage dealer licensee, to make the requirements more understandable and user friendly to retail dealers and wholesale dealers, and to deter applicants from obtaining licenses with the intention of operating less than legitimate businesses in furtherance of illegal activities. The department considered applying the office structure provisions to current and future licensees, but determined that any economic impact, however slight, should be directed to future new license applicants who could better incorporate any economic impact in making the initial decision of applying for a license. The department also determined that clarifying particular standards for a permanent place of business that could subject an entity to an enforcement action and, potentially, an administrative penalty, may have a deterrent effect, which is in itself valuable.

The department concluded that the rules as proposed accomplish the objectives needed to improve the safety of the general public and the economic welfare of the state with the least amount of economic impact on the regulated industries. The department feels the rules are necessary to achieve a sound sys-

tem of distributing and selling motor vehicles as required under Occupations Code, §2301.001.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9:00 a.m. on January 29, 2008, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Government and Public Affairs Division, 125 East 11th Street, Austin, Texas 78701-2483, (512) 305-9137 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§8.138 - 8.140, and 8.146, and new §§8.138 - 8.140, 8.146, 8.150 - 8.160, may be submitted to Brett Bray, Director, Motor Vehicle Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on February 18, 2008.

43 TAC §§8.138 - 8.140, 8.146

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005 and Occupations Code, §2301.155, and Transportation Code, §503.002, which authorize the commission to establish rules for motor vehicle dealers.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.354 and §2301.651, and Transportation Code, §§502.451, 503.005, 503.027, 503.028, 503.032, 503.062, 503.0625, 503.0626, 503.063, 503.0631, and 503.0632.

§8.138. Temporary Cardboard Tags.

§8.139. Metal Dealer License Plates and Temporary Cardboard Tags.

§8.140. Established and Permanent Place of Business.

§8.146. Metal Converter's License Plates and Temporary Cardboard Tags.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800044
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-8683

♦ ♦ ♦

43 TAC §§8.138 - 8.140, 8.146, 8.150 - 8.160

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Occupations Code, §2301.005 and Occupations Code, §2301.155, and Transportation Code, §503.002, which authorize the commission to establish rules for motor vehicle dealers.

CROSS REFERENCE TO STATUTE

Occupations Code, §2301.354 and §2301.651, and Transportation Code, §§502.451, 503.005, 503.027, 503.028, 503.032, 503.062, 503.0625, 503.0626, 503.063, 503.0631, and 503.0632.

§8.138. Use of Metal Dealer License Plates.

(a) Metal dealer license plates shall be attached to the rear license plate holder of vehicles on which such plates may be displayed pursuant to Transportation Code, §503.061. A copy of the receipt for the metal dealer's plate issued by the division should be carried in the vehicle so that it can be presented to law enforcement personnel upon request.

(b) Metal dealer license plates may not be displayed on laden commercial vehicles being operated or moved upon the public streets or highways or on the dealer's service or work vehicles.

(1) Examples of vehicles considered as service or work vehicles for purposes of this subsection are:

(A) a vehicle used for towing or transporting other vehicles;

(B) a vehicle, including a light truck, used in connection with the operation of the dealer's shops or parts department;

(C) a courtesy car on which a courtesy car sign is displayed;

(D) a rental or lease vehicle; and

(E) a boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.

(2) A light truck is not considered to be a laden commercial vehicle when it is:

(A) mounted with a camper unit; or

(B) towing a trailer for recreational purposes.

(3) As used in this subsection, "light truck" has the meaning assigned by Transportation Code, §541.201.

(c) Metal dealer license plates may be displayed only on the type of vehicle for which the general distinguishing number is issued and which a dealer is licensed to sell. Non-franchised dealers may not display metal plates on new motor vehicles.

(d) A dealer shall maintain a record of each dealer metal plate issued to that dealer that contains:

(1) the assigned metal plate number;

(2) the year and make of the vehicle to which the plate is affixed;

(3) the Vehicle Identification Number of the vehicle; and

(4) the name of the person in control of the vehicle.

(e) Dealer metal plates that cannot be accounted for shall be voided in the dealer's record and reported as missing to the department within three days of the date that the discovery is made. After a plate is reported as missing it is no longer valid for use.

(f) The dealer's record required under subsections (d) and (e) of this section shall be available at the dealer's location during normal working hours for review by a representative of the department.

§8.139. Metal Dealer Plate Allocation.

(a) The number of metal dealer plates a dealer may order for business use is allocated based on the type of license applied for and the number of vehicles sold during the previous year. New license applicants are allotted a predetermined number of metal dealer plates during the first license term.

(b) The maximum number of metal dealer plates issued to a new license applicant during the first license term is:

(1) Franchised motor vehicle dealer - 5;

(2) Franchised motorcycle dealer - 5;

(3) Independent motor vehicle dealer - 2;

(4) Independent motorcycle dealer - 2;

(5) Franchised or independent travel trailer dealer - 2;

(6) Utility trailer or semi-trailer dealer - 2;

(7) Independent mobility vehicle dealer - 2; and

(8) Wholesale dealer - 1.

(c) A newly licensed dealership with a previous license status is not subject to the initial allotment limits described in subsection (b) of this section, and may rely on that previous license status to obtain dealer plates, if it is:

(1) a franchised dealership that has been subject to a buy-sell agreement, regardless of a change in the entity or ownership; or

(2) any type of dealer that relocates and has been licensed for a period of one year or longer.

(d) Upon renewal of the dealer license, the maximum number of dealer plates issued to a motor vehicle dealer per license term is:

(1) Franchised motor vehicle dealer - 30;

(2) Franchised motorcycle dealer - 10;

(3) Independent motor vehicle dealer - 3;

(4) Independent motorcycle dealer - 3;

(5) Franchised or independent travel trailer dealer - 3;

(6) Utility trailer or semi-trailer dealer - 3;

(7) Independent mobility vehicle dealer - 3; and

(8) Wholesale dealer - 1.

(e) A dealer may obtain more than the maximum number of plates set out in subsection (d) of this section, by submitting proof of sales for a year.

(1) The dealer may receive the following additional plates:

(A) Wholesale dealers - 1;

(B) Dealers selling fewer than 50 vehicles - 1;

(C) Dealers selling 50 to 99 vehicles - 2;

(D) Dealers selling 100 to 200 vehicles - 5; or

(E) Dealers selling more than 200 vehicles may receive any number of dealer plates at the dealer's discretion.

(2) For purposes of this subsection and subsection (f) of this section, proof of sales consists of a copy of the most recently filed Vehicle Inventory Tax Declaration or monthly statements duly filed with the proper taxing authority in the county of the dealership's location. Each copy must be stamped received by the tax authority. Any franchised dealer's renewal license application that indicates sales of more than 200 units is considered to be proof of sales of more than 200 units and no additional proof is required.

(f) The director or director's designee may waive the dealer plate issuance restrictions in accordance with this subsection if the waiver is essential for the continuation of the business. The director or the director's designee will base the determination of the number of dealer plates the dealer will receive on the dealer's past sales, inventory, and any other factors that the director determines pertinent.

(1) A request for a waiver must be in writing and specifically state why the additional plates are necessary for the continuation of the applicant's business.

(2) A request for a waiver must be accompanied by proof of the dealer's sales for the previous year.

(3) A wholesale dealer may not apply for waiver of dealer plate issuance restrictions.

(4) A waiver granted under this subsection for a specific number of plates is valid for three years.

§8.140. Established and Permanent Place of Business.

A dealer must meet the following requirements at each location where the dealer sells or offers vehicles for sale.

(1) Business hours for retail dealers.

(A) A retail dealer's office facility shall be open at least four days per week for at least four consecutive hours per day between the hours of 8:00 a.m. and 8:00 p.m.

(B) The dealer's business hours for each day of the week must be posted at the main entrance of the dealer's office that is accessible to the public. The owner or a bona fide employee of the dealer shall be at the dealer's licensed location during the posted business hours for the purpose of buying, selling, exchanging, or leasing vehicles. If the owner or a bona fide employee is not available

to conduct business during the dealer's posted business hours due to special circumstances or emergencies, a separate sign must be posted indicating the date and time the dealer will resume operations. The dealer shall notify the division in writing of any change in the dealer's standard business hours. Regardless of the retail dealer's business hours the dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, answering service, or answering machine.

(2) Business hours for wholesale dealers. A dealer who holds only a wholesale license must post its business hours at the main entrance of the dealer's office. A wholesale dealer shall be at the dealer's licensed location for at least two weekdays per week at least two consecutive hours per day between the hours of 8:00 a.m. and 6:00 p.m. Regardless of the wholesale dealer's business hours the dealer's telephone must be answered from 8:00 a.m. to 5:00 p.m. weekdays by a bona fide employee, answering service, or answering machine.

(3) Business sign requirements for retail dealers. A retail dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the dealer's business name, or assumed name as reflected on the dealer's license, under which the dealer conducts business. The sign may omit terms such as "Inc.," "LLC," "LP," or similar identifiers of the entity type. The sign must be permanently mounted and must be readable from the street at the address listed on the application for the dealer license. Temporary banners or signs are not acceptable.

(4) Business sign requirements for wholesale dealers. A wholesale dealer must display a conspicuous, permanent sign with letters at least six inches in height showing the dealer's business name or assumed name as reflected on the dealer's license, under which the dealer conducts business. The sign may omit terms such as "Inc.," "LLC," "LP," or similar identifiers of the entity type. The sign must be permanently mounted on the business property and shall be on the main door to the dealer's office or on the outside of the building housing the office. If the dealership is located in an office building with one or more other businesses and an outside sign is not permitted by the landlord, a business sign permanently mounted on or beside the main door to the dealer's office with letters at least two inches in height is acceptable. Temporary banners or signs are not acceptable.

(5) Office structure for retail and wholesale dealers. Unless otherwise authorized by the Transportation Code, a dealer that files an application for a new license or a supplemental location after May 1, 2008 must conform to the requirements of this subsection.

(A) The office of a retail or wholesale dealer must be located in a building, with connecting exterior walls on all sides, that has been assigned a separate mailing address by the U.S. Postal Service. The office structure must have at least 100 square feet of interior floor space exclusive of hallways, closets, or restrooms and have a minimum seven foot ceiling.

(B) A dealer's office must comply with all applicable local zoning ordinances and deed restrictions.

(C) A dealer's office must have electricity with adequate heating and lighting.

(D) A dealer's office may not be located within a residence, apartment house, hotel, motel, or rooming house.

(E) A storeroom, closet, stock room, or any other room that is not open to the public may not be designated as the dealer's office.

(F) A route to a dealer's office may not pass through a food preparation area.

(G) The physical address of the dealer's office must be recognized by the U.S. Postal Service or capable of receiving U.S. mail. Licenses and dealer plates will not be mailed to any out-of-state address.

(H) A portable-type office structure may qualify as an office only if the structure meets the requirements of this section and is not a readily moveable trailer or other vehicle.

(6) Required office equipment for retail and wholesale dealers. At a minimum, the office must be equipped with:

(A) a desk;

(B) two chairs;

(C) a file cabinet to hold records;

(D) Internet access and printer;

(E) a fax machine; and

(F) a land-based, working telephone listed in the business name or assumed name under which the dealer does business.

(7) Number of retail dealers in one office. Not more than four retail dealers may be located in the same business structure.

(8) Number of wholesale dealers in one office. Not more than eight wholesale dealers may be located in the same business structure.

(9) Wholesale and retail dealers office sharing prohibition. Unless otherwise authorized by the Transportation Code, a retail motor vehicle dealer and a wholesale motor vehicle dealer either of which is established after September 1, 1999, may not be located in the same business structure.

(10) Dealer housed with other business.

(A) If a person conducts business as a dealer in conjunction with another business owned by the same person and under the same name as the other business, the same telephone number may be used for both businesses. If the name of the dealer differs from that of the other business, a separate telephone listing, a separate telephone and fax number, and a separate sign for each business is required.

(B) A person may conduct business as a dealer in conjunction with another business not owned by that person only if the dealer owns the property on which business is conducted or has a separate lease agreement from the owner of that property meeting the requirements of paragraph (13) of this section. The same telephone number may not be used by both businesses. The dealer must have separate business signs, telephone listings, and office equipment required under this section.

(11) Display area requirements. A wholesale dealer is not required to have display space at the dealer's business premises. A retail dealer must have an area designated as display space for the dealer's inventory in accordance with this subsection.

(A) The display area must be located at the dealer's business address or contiguous with the dealer's address. A non-contiguous storage lot is permissible only if there is no public access and no sales activity occurs at the storage lot. A sign stating the dealer's name and the fact the property is a storage lot is permissible.

(B) A dealer's display area must be sufficient to display at least five vehicles of the type for which the general distinguishing number is issued. Those spaces must be reserved exclusively for the dealer's inventory and may not be shared with another business or a public parking area, a driveway to the office, or another dealer's display area.

(C) The display area may not be on a public easement, right-of-way, or driveway unless the governing body having jurisdiction of the easement, right-of-way, or driveway expressly consents in writing to use as a display area. If the easement, right-of-way, or driveway is a part of the state highway system, use as a display area may only be authorized by a lease agreement.

(D) The display area must be used exclusively for the dealer's inventory.

(E) If the display area is in conjunction with another vehicle dealership, the display area must be separated in such a manner that the inventories of the dealers are readily discernible from each other. The inventory of each dealer must be grouped together and not intermingled and each vehicle in the inventory of a dealer must be clearly marked to identify the dealer offering the vehicle for sale.

(F) If the display area is in conjunction with another business that is not related to the sale or operation of motor vehicles, the display area for the dealer's inventory must be separated from any other parking area by a material object or barricade that is affixed to the ground in a manner that cannot be readily moved by an individual.

(G) If the display area is in conjunction with another business that is not related to the sale or operation of motor vehicles, a permanent sign must be erected that designates the area as reserved for the dealer's inventory with the dealer's name and telephone number on the sign with letters at least six inches in height. When the display area is full, additional inventory vehicles may be parked outside the display area only in an area immediately adjacent to the barricaded area. The additional inventory must be on the licensed premises and not in any restricted area such as right-of-way or public sidewalks. Any additional inventory not within the barricaded area must be identified by a sign, with the dealer's name and telephone number that clearly distinguishes the inventory from any public or employee parked vehicles.

(H) The display area must be adequately illuminated if the dealer is open after sundown so that vehicles for sale can be properly inspected by any prospective customer.

(I) The display area may be located inside a building, subject to approval by the division director or the director's designee.

(J) If the dealer's premises includes gasoline pumps or houses another business that sells gasoline, the dealer's display area may not be part of the parking area for gasoline customers and may not interfere with access to or from the gasoline pumps. The display area may not contain a fuel fill port or any fire prevention access to the fuel tanks.

(l2) Dealer with salvage dealer license. If a dealer also holds a salvage dealer license, each salvage vehicle that is offered for sale on the premises of the dealer's display area must be clearly and conspicuously marked with a sign that informs the potential buyers that the vehicle is a salvage vehicle.

(13) Lease requirements. If the premises from which a dealer conducts business, including any display area that is not owned by the dealer, the dealer must maintain a lease that is continuous with the period for which the dealer's license will be issued. That lease agreement must be on a properly executed form containing at a minimum:

(A) the names of the lessor and lessee;

(B) the period of time for which the lease is valid; and

(C) the street address or legal description of the property, provided that if only a legal description of the property is provided, the applicant must attach a statement that the property description in the lease agreement is the street address identified on the application.

(14) Dealer must display license. A dealer must display the dealer license issued by the department at all times in a manner that makes the license easily readable by the public and in a conspicuous place at each place of business for which it is issued. If the dealer's license applies to more than one location, a copy of the original license may be displayed in each supplemental location.

§8.146. Metal Converter's License Plates.

(a) Metal converter's license plates shall be attached to the rear license plate holder of vehicles on which the plates may be displayed pursuant to Transportation Code, §503.0618.

(b) Metal converter's license plates tags may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.

(c) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove the dealer's temporary tag. The selling dealer may attach a buyer's temporary tag to that vehicle or the purchasing converter may display a converter's temporary tag or metal converter plate on that vehicle.

(d) A converter shall maintain a record of each converter metal plate issued to that converter that contains:

(1) the assigned metal plate number;

(2) the year and make of the vehicle to which the metal plate is affixed;

(3) the vehicle identification number of the vehicle; and

(4) the name of the person in control of the vehicle.

(e) Converter metal plates that cannot be accounted for shall be voided in the dealer's record and reported as missing to the department within three days. After a plate is reported as missing it is no longer valid.

(f) The converter's record, required under subsections (d) and (e) of this section, shall be available at the converter's location during normal working hours for review by a representative of the department.

§8.150. Authorization to Issue Temporary Tags.

(a) Dealers who hold a General Distinguishing Number license may issue dealer temporary tags, initial buyer's temporary tags, supplemental buyer's temporary tags, Internet-down temporary tags, and emergency temporary tags for each type of vehicle the dealer is licensed to sell. A converter who holds a converter's license under Occupations Code, Chapter 2301 may issue converter temporary tags.

(b) Licensees may issue applicable temporary dealer, buyer's, supplemental buyer's, or converter tags until a license is cancelled, revoked, or suspended in accordance with law.

(c) A dealer's authorization to obtain numbers in advance for use on Internet-down and emergency tags may be modified, suspended, or revoked after opportunity for hearing in accordance with Occupations Code, Chapter 2301 and Government Code, Chapter 2001, if the dealer has misused the tags or failed to comply with the requirements for issuance and recordkeeping in Transportation Code, §503.067 or this subchapter.

§8.151. Temporary Tags, General Use Requirements, and Prohibitions.

(a) All temporary tags shall be displayed in the rear license plate holder of the vehicle.

(b) All printed information on a temporary tag must be visible and may not be covered or obstructed by any plate holder.

(c) Homemade tags or tags that have buyer's tag information printed on one side and dealer's tag information printed on the other side are not permitted.

(d) Each motor vehicle being transported using the full mount method, the saddle mount method, the tow bar method, or any combination of those methods in accordance with Transportation Code, §503.068(d), must have a dealer's or converter's temporary tag or a buyer's temporary tag, whichever is applicable, affixed to that vehicle. If the vehicle being transported is unable to qualify for registration because it is of a type that is prohibited from operating upon the public streets and highway (i.e., off-highway vehicle or self-propelled machine), a tag shall be displayed that states in bold letters "For Off Highway Use Only."

§8.152. Obtaining Numbers for Issuance of Temporary Tags.

(a) Dealers and converters must have Internet access to connect to the temporary tag databases maintained by the department.

(b) Except as provided by §8.155 and §8.156 of this subchapter, the dealer or converter must enter into the database information about the vehicle, dealer, converter, or buyer, as appropriate, and obtain a specific number for the tag before a temporary tag may be issued and displayed on a vehicle.

§8.153. Specifications for All Temporary Tags.

(a) Information printed or completed on all temporary tags must be in black ink.

(b) Dealers and converters may issue a temporary tag by any of the methods described in this subsection.

(1) A dealer or converter may copy or print the information provided from the database to cardboard stock in accordance with the specifications of the appropriate appendix listed in subsection (d) of this section.

(2) A dealer or converter may print the image of the information provided by the database on a full 8 1/2 inch by 11 inch sheet label and affix the label to a 6 inch by 11 inch cardboard.

(3) A dealer or converter may print the image of the information provided by the database on a full 8 1/2 inch by 11 inch piece of paper, affix the paper to a 6 inch by 11 inch cardboard by glue or tape so that it is completely adhered to the cardboard backing, and place a 2 inch piece of clear tape over the specific number. As an alternative to using the clear tape, the tag may be placed in a 6 inch by 12 inch, 2 mil clear poly bag to protect the paper tag from the elements.

(4) A dealer or converter may print the image of the information provided by the database on a full 8 inch by 11 inch piece of paper and place the tag in a 6 inch by 12 inch, 2 mil clear poly bag to protect the paper tag from the elements.

(c) If a dealer or converter chooses to use printed cardboard dealer or converter temporary tags, initial buyer's temporary tags, or supplemental buyer's temporary tags on cardboard stock on which the dealer or converter fills in the required information by hand, the tags must be printed in accordance with this subsection and with the specifications of appropriate appendix listed in subsection (d) of this section.

(1) Motor vehicle, travel trailer, trailer/semitrailer, and converter tags must be printed on at least 6-ply cardboard, with bolt holes horizontally punched on 7 inch centers and vertically punched on 4 1/2 inch centers. Motorcycle tags must be printed on at least 6-ply cardboard, with bolt holes horizontally punched on 5 3/4 inch centers and vertically punched on 2 3/4 inch centers.

(2) Cardboard tags completed by hand must have the information drawn in letters and numerals with a permanent thick black marking pen. The vehicle-specific number must be completely covered with one strip of 2 inch wide, clear tape or placed in a 6 inch by 12 inch, 2 mil clear poly bag that covers the entire tag.

(d) If a dealer or converter uses the cardboard option for temporary tags and completes the tag with information from the database, the dealer or converter shall use the design of the respective temporary tag from the appropriate following appendices:

(1) Appendix A-1 - Dealer - Assigned to specific vehicle; Figure 43 TAC §8.153(d)(1)

(2) Appendix A-2 - Dealer - Assigned to Agent; Figure 43 TAC §8.153(d)(2)

(3) Appendix B-1 - Buyer - Initial; Figure 43 TAC §8.153(d)(3)

(4) Appendix B-2 - Buyer - Supplemental; Figure 43 TAC §8.153(d)(4)

(5) Appendix B-3 - Internet-down Tag; Figure 43 TAC §8.153(d)(5)

(6) Appendix B-4 - Emergency State Tag; and Figure 43 TAC §8.153(d)(6)

(7) Appendix C-1 - Converter. Figure 43 TAC §8.153(d)(7)

(e) Dealers and converters shall comply with this section on the date that the database system is made generally available for use by the department. The department will open the database at least 60 days before it becomes generally available to allow dealers an opportunity to review the system and become familiar with the database requirements. The department will publish separate notices in the Texas Register that provide prior notice of:

(1) the date on which the dealers may begin reviewing the database system; and

(2) the date on which compliance with this section is required.

§8.154. Dealer Temporary Tags.

(a) Dealer temporary tags may be displayed only on the type of vehicle for which the general distinguishing number is issued and for which a dealer is licensed to sell.

(b) Dealer temporary tags may be used by the dealer only to:

(1) demonstrate the vehicle or cause the vehicle to be demonstrated to a prospective buyer for sale purposes only;

(2) convey or cause the vehicle to be conveyed:

(A) from one of the dealer's places of business in this state to another of the dealer's places of business in this state;

(B) from the dealer's place of business to a place where the vehicle is to be repaired, reconditioned, or serviced;

(C) from the state line or a location in this state where the vehicle is unloaded to the dealer's place of business;

(D) from the dealer's place of business to a place of business of another dealer;

(E) from the point of purchase by the dealer to the dealer's place of business; or

(F) to road test the vehicle; or

(3) use the vehicle for or allow its use by a charitable organization or use the vehicle or allow its use in parades.

(c) A vehicle being conveyed under this section is exempt from the inspection requirements of Transportation Code, Chapter 548.

(d) A dealer who holds a wholesale motor vehicle auction general distinguishing number may display its dealer temporary tags on any vehicles that are transported to or from the licensed auction location by a bona fide employee or agent of the auction.

(e) When an unregistered vehicle is sold to another dealer, the selling dealer shall remove any dealer temporary tag. The selling dealer may attach a buyer's temporary tag to the vehicle or the purchasing dealer may display a dealer temporary tag or metal dealer plate on the vehicle. If a vehicle is consigned from one dealer to another, the vehicle must display the temporary tag of the dealer to which that vehicle was consigned.

(f) Dealer temporary tags may not be displayed on laden commercial vehicles being operated or moved upon the public streets or highways or on the dealer's service or work vehicles. This subsection does not apply to buyer tags or supplemental buyer tags or to dealer tags placed on a vehicle loaned to a charitable organization or school.

(1) Examples of vehicles considered as service or work vehicles for purposes of this subsection are:

(A) a vehicle used for towing or transporting other vehicles;

(B) a vehicle, including a light truck used in connection with the operation of the dealer's shops or parts department;

(C) a courtesy car on which a courtesy car sign is displayed;

(D) a rental or lease vehicle; and

(E) any boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.

(2) A light truck is not considered to be a laden commercial vehicle when it is:

(A) mounted with a camper unit; or

(B) towing a trailer for recreational purposes.

(3) As used in this subsection, "light truck" has the same meaning assigned by Transportation Code, §541.201.

(g) A dealer temporary tag may not be used to operate a vehicle for the personal use of a dealer or a dealer's employee.

(h) A dealer temporary tag must show its expiration date which may not exceed 60 days after its date of issuance.

(i) A dealer temporary tag may be issued by a dealer to a specific vehicle or to a dealer's agent who is authorized to operate a motor vehicle owned by the dealer.

(j) A dealer who issues a dealer temporary tag to a specific vehicle must ensure that the following information is placed on the tag:

(1) the vehicle-specific number from database;

(2) the year and make of vehicle;

(3) the vehicle identification number (VIN); and

(4) the month, day, and year of the tag's expiration.

(k) A dealer who issues a dealer temporary tag to an agent must ensure that the following information is placed on the tag:

(1) the agent-specific number from database;

(2) the name of the authorized agent; and

(3) the month, day, and year of the tag's expiration.

§8.155. Buyer's Temporary Tags.

(a) A temporary buyer's tag or supplemental buyer's tag may be displayed only on a vehicle that may be operated upon the public streets and highways and for which a sale has been consummated.

(b) A dealer must place a temporary buyer's tag on any new or used vehicle sold by the dealer, except for a vehicle sold in a wholesale transaction in which the purchasing dealer places its own dealer temporary tag on the vehicle.

(c) Temporary buyer's tags are valid for a period that does not exceed 21 calendar days after the date the vehicle is sold.

(d) If a dealer has been unable to obtain the necessary documents to obtain permanent metal license plates on behalf of the buyer because the documents are in the possession of a lienholder who has not complied with the terms of Transportation Code, §501.115(a), the dealer may issue a supplemental buyer's tag. Within 20 working days of the date of sale the dealer must access the database and renew the vehicle-specific number previously issued. The supplemental buyer's tag is valid for a period that does not exceed 20 working days after the date of its issuance. The dealer may not issue more than one supplemental buyer's tag for a vehicle.

(e) The dealer must ensure that the following information is placed on a buyer's or supplemental buyer's tag that the dealer issues:

(1) the vehicle-specific number obtained from database;

(2) the vehicle identification number (VIN) of the vehicle;

(3) the year and make of vehicle; and

(4) the month, day, and year of the tag's expiration.

§8.156. Buyer's Temporary Tag Receipt and Notice to Buyer.

(a) A dealer must provide a buyer's temporary tag receipt to the buyer of each vehicle to which a buyer's temporary tag is issued regardless of whether the tag is issued in the ordinary course of business or is an Internet-down or emergency tag. The dealer may print the image of the receipt issued from the database or construct the form using the same information. The dealer must have the buyer sign the form and instruct the buyer to keep a copy of the receipt in the vehicle until the vehicle is registered in the buyer's name and metal plates are affixed to the vehicle. The receipt must include the following information.

(1) the issue date of the buyer's tag;

(2) the year, make, model, body style, color, and vehicle identification number (VIN) of the vehicle sold;

(3) the vehicle-specific tag number;

(4) the expiration date of the tag;

(5) the date of the sale;

(6) the name of the issuing dealer and the dealer's license number; and

(7) the buyer's name and mailing address.

(b) The dealer must keep a copy of the receipt signed by the buyer in the sales records that are required to be kept under §8.144 of this subchapter.

(c) With each initial buyer's tag issued, the dealer must provide the buyer with a copy of the laws regarding temporary tags in the

form of the Notice to Buyer approved by the department and available through the database for temporary tags. The buyer must sign the dealer's copy of the buyer's receipt as set out in subsection (a) of this section, acknowledging receipt of a copy of the Notice to Buyer. The dealer must keep a copy of the receipt signed by the buyer in the sales records that are required to be kept under §8.144 of this subchapter.

§8.157. Advance Numbers, Internet-down Buyer's Temporary Tags.

(a) In accordance with Transportation Code, §503.0631(d), a dealer may obtain an advance supply of specific numbers to issue temporary buyer's tags if the dealer is unable to access the Internet.

(b) If a dealer is unable to access the Internet at the time of sale, the dealer must complete and sign the dealer's copy of the buyer's receipt form and enter the required information on the sale into the database not later than the close of the next business day.

§8.158. Advance Numbers, Emergency Buyer's Temporary Tags.

(a) In accordance with Transportation Code, §503.063(f), a dealer may obtain a supply of specific numbers from the database to issue temporary buyer's tags if the dealer is unable to access the Internet due to an emergency. Such a number may be used on buyers' tags only if a hurricane, flood, or other event prohibits the supply of power or electronic communications to the dealer's business for longer than two days.

(b) The dealer must complete and sign the dealer's copy of the buyer's receipt form and enter the required information on the sale into the database not later than 24 hours after the time that power or communication is restored.

§8.159. General Requirements and Allocation of Internet-down and Emergency Buyer's Tag Numbers.

(a) Advance Internet-down and emergency numbers shall be kept in a locked, secure place. The dealer is responsible for the safekeeping of those numbers and shall report any loss, theft, or destruction of those numbers to the department within 24 hours of the time of an event.

(b) Advance Internet-down and emergency numbers may be used up to 12 months after the date of issuance from the database. As a dealer uses the Internet-down or emergency numbers, or the numbers expire, a dealer at any time may download additional Internet-down or emergency advance numbers up to the maximum allowed.

(c) Advance Internet-down and emergency numbers will be allocated to dealers based upon a percentage of their annual sales. Annual sales will be determined by the Vehicle Inventory Tax filings a dealer makes with the state.

(d) The number of Internet-down advance numbers a dealer may download is equal to the greater of one or one percent of the dealer's total annual sales.

(e) New license applicants will be allotted a predetermined number of Internet-down advance numbers during the first license term in accordance with the following schedule:

(1) franchised motor vehicle dealer - 15;

(2) franchised motorcycle dealer - 5;

(3) independent motor vehicle dealer - 3;

(4) independent motorcycle dealer - 2;

(5) franchised or independent travel trailer dealer - 1;

(6) utility trailer or semi-trailer dealer - 1; and

(7) independent mobility vehicle dealer - 1.

(f) The maximum number of emergency advance numbers a dealer may download is equal to the greater of one or an amount equal to 1/52 times of the dealer's total annual sales.

(g) A new license applicant will be allotted a predetermined number of emergency advance numbers during the first license term in accordance with the following schedule:

(1) franchised motor vehicle dealer - 25;

(2) franchised motorcycle dealer - 10;

(3) independent motor vehicle dealer - 3;

(4) independent motorcycle dealer - 2;

(5) franchised or independent travel trailer dealer - 1;

(6) utility trailer or semi-trailer dealer - 1; and

(7) independent mobility vehicle dealer - 1.

(h) A newly licensed dealer with a previous license status is not subject to the initial allotment limits described in subsections (e) and (g) of this section and may rely on that previous license status to obtain advance Internet-down and emergency advanced numbers if it is:

(1) a franchised dealership that has been subject to a buy-sell agreement, regardless of a change in the entity or ownership; or

(2) any type of dealer that relocates and has been licensed for a period of one year or longer.

(i) A dealer can obtain more than the maximum number of advance numbers for the first year of business as set out in subsections (e) and (g) of this section.

(1) A dealer may apply for additional advance Internet-down or emergency numbers by:

(A) submitting proof of sales of first month of business in the form of a Vehicle Inventory Tax statement showing the dealership qualifies for a larger amount of advance numbers; or

(B) submitting a signed written request for waiver with proof showing that the dealer has other dealerships that have consistently sold vehicles in an amount that would qualify for a larger amount of advance numbers.

(2) The director or director's designee may approve in accordance with this paragraph an additional amount of Internet-down or emergency numbers for a dealer if the additional amount is essential for the continuation of the business. The director or the director's designee will base the determination of the amount of advance numbers the dealer will receive on the dealer's past sales, inventory, and any other factors that the director determines pertinent. A request for additional advance numbers must be in writing and specifically state why the additional advance numbers are necessary for the continuation of the applicant's business.

§8.160. Converter's Temporary Tags.

(a) Converter's temporary tags may be used only by the converter or the converter's employees on unregistered vehicles to:

(1) demonstrate the vehicle, or cause the vehicle to be demonstrated, to a prospective buyer who is a franchised motor vehicle dealer or an employee of a franchised motor vehicle dealer; or

(2) convey the vehicle or cause the vehicle to be conveyed:

(A) from one of the converter's places of business in this state to another of the converter's places of business in this state;

(B) from the converter's place of business to a place where the vehicle is to be assembled, repaired, reconditioned, modified, or serviced;

(C) from the state line or a location in this state where the vehicle is unloaded to the converter's place of business;

(D) from the converter's place of business to a place of business of a franchised motor vehicle dealer; or

(E) to road test the vehicle.

(b) Prospective buyers who are employees of a franchised dealer or a converter may operate a vehicle displaying converter's temporary tags during a demonstration.

(c) A vehicle being conveyed while displaying a converter's temporary tag is exempt from the inspection requirements of Transportation Code, Chapter 548.

(d) Converter's temporary tags may not be used to operate a vehicle for the converter's or a converter's employee's personal use.

(e) Converter's temporary tags may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.

(f) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove a dealer's temporary tag. The selling dealer may attach a buyer's temporary tag to the vehicle or the purchasing converter may display a converter's temporary tag or metal converter plate on the vehicle.

(g) A converter temporary tag must show its expiration date which may not be more than 60 days after the date of its issuance.

(h) A converter temporary tag may be issued by a converter to a specific vehicle or to a converter's agent who is authorized to operate a motor vehicle owned by the converter.

(i) A converter who issues a temporary converter's tag to a specific vehicle shall ensure that the following information is placed on the tag:

(1) the vehicle specific number from database;

(2) the year and make of vehicle;

(3) the vehicle identification number (VIN) of the vehicle; and

(4) the month, day and year of the tag's expiration.

(j) A converter who issues a temporary converter's tag to an agent shall ensure that the following information is placed on the tag:

(1) the agent-specific number from database;

(2) the name of the authorized agent; and

(3) the month, day, and year of the tag's expiration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800045
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: February 17, 2008
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES SUBCHAPTER F. REPORTING REQUIREMENT FOR A GENERAL-PURPOSE COMMITTEE

1 TAC §20.435

The Texas Ethics Commission withdraws the proposed amendments to §20.435 which appeared in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6467).

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800042
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: January 4, 2008
For further information, please call: (512) 463-5800

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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 31. AGENCY PROCEDURES

13 TAC §31.4

The Texas Commission on the Arts withdraws the emergency amendment to §31.4 which appeared in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8233).

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800054
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 27, 2008
For further information, please call: (512) 936-6564

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CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

13 TAC §35.1, §35.2

The Texas Commission on the Arts withdraws the emergency repeal of §35.1 and §35.2 which appeared in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8234).

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800055
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 27, 2008
For further information, please call: (512) 936-6564

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13 TAC §35.1, §35.2

The Texas Commission on the Arts withdraws the emergency new §35.1 and §35.2 which appeared in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8233).

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800056
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 27, 2008
For further information, please call: (512) 936-6564

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 358. MEDICAID ELIGIBILITY

SUBCHAPTER E. INCOME

1 TAC §358.465

Pursuant to Senate Bill (S.B.) 22, 80th Legislature, Regular Session, 2007, amending Subchapter B, Chapter 32 of the Human Resources Code, the Texas Health and Human Services Commission (HHSC) adopts an amendment to the Texas Administrative Code (TAC), Title 1, Part 15, Subchapter E, Chapter 358, Medicaid Eligibility, §358.465, Income Exclusions, paragraph (3). Section 358.465 is adopted with changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4157). The text of the rule will be republished.

The purpose of this amendment is to allow a $20 exclusion of unearned or earned income from an individual's monthly income in determining an individual's eligibility for community attendant services.

Background and Justification

The special income limit of 300 percent of the Supplemental Security Income (SSI) Federal Benefit Rate (FBR) is used for determining eligibility for Community Attendant (CA) services. The special income limit is $1,869 per month for 2007.

Under 42 CFR 435.1005, Federal Financial Participation (FFP) is available for recipients whose eligibility is based on the special income limit provided the individual's income, before deductions, does not exceed 300 percent of the SSI FBR.

The 80th Legislature enacted S.B. 22 to exclude $20 of unearned or earned income from an individual's gross monthly income in determining an individual's eligibility for community attendant services.

Federal approval to allow the $20 disregard is required to implement this provision. As of this date, the Center for Medicare and Medicaid services has not granted approval to implement this provision.

This amendment to the TAC is necessary to comply with S.B. 22.

Rule Change Summary

This amended rule incorporates the statutory change to allow a $20 exclusion of unearned or earned income from an individual's gross monthly income in determining an individual's eligibility for community attendant services. The amendment also changes language of "Type Program 14" to "special income limit programs."

The Health and Human Services Commission received no comments on the proposed amendment. Additional language has been added to the rule to clarify that approval of the Center for Medicare and Medicaid Services is required before the state may allow the $20 exclusion.

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§358.465. Income Exclusions.

(a) General exclusion. For each month, the first $20 of unearned or earned income is excluded. This exclusion is applied first to unearned income, then to earned income if the unearned income is less than $20. If no unearned income exists, the entire $20 exclusion is applied to the earned income. Exceptions are as follows.

(1) Although the exclusion does not apply to VA pensions and parents' DIC, it does apply to VA compensation and insurance. If, however, a client receives income from a VA pension and another source, he retains the general exclusion.

(2) In the case of an eligible couple, only one exclusion is applied to the couple's combined earned income.

(3) The $20 general exclusion does not apply those cases for which eligibility is determined based on the special income limit up to 300% of the SSI federal benefit rate, unless the case is a Community Attendant Services case and the Center for Medicare and Medicaid Services (CMS) has authorized the state to allow the exclusion.

(b) Earned income exclusion. After applying the $20 general exclusion, the commission excludes $65 of the remaining earned income plus one-half of the remaining earnings. In the case of an eligible couple, the commission allows only one earned income exclusion for the couple's combined earned income. The earned income exclusion does not apply to Type Program 14 cases.

(c) Income exclusion for Type Program 03 clients. For clients who qualify for Type Program 03 and who received a 20% Social Security cost-of-living increase in October 1972, the commission excludes the amount of that increase in determining the client's eligibility. For clients who qualify for Type Program 03 because of an SSI denial after April 1977, the commission excludes Social Security cost-of-living increases received since the client last received both SSI and Social Security benefits in the same month.

(d) VA aid-and-attendance exclusion. The following requirements apply:

(1) The commission excludes aid-and-attendance allowances, housebound allowances, and VA reimbursement for unusual medical expenses in the income eligibility determination and applied income calculation because they represent medical expenses paid by a third party.

(2) Clients who have changed to the 1979 pension plan or who initially obtain entitlement to a VA pension after January 1, 1979, must apply for aid-and-attendance or other potentially available benefits as a condition of eligibility.

(e) Exclusion for work expenses for the blind. In addition to the earned income exclusion, a blind client's earned income is reduced by the amount of expenses that he can reasonably attribute to the earnings of the income.

(f) Housebound allowances. The commission excludes VA housebound allowances in the eligibility determination and applied income processes because they represent medical expenses paid by a third party. Veterans and widow(ers) who do not qualify for regular aid and attendance may qualify for a housebound allowance. Housebound allowances are usually received only by an individual living in the community.

(g) Reduced income. Earned or unearned income not excluded from consideration by the previous exclusions may be reduced to the extent that it is needed to fulfill a blind or disabled client's approved plan for attaining self-support.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800065
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 27, 2008
Proposal publication date: July 6, 2007
For further information, please call: (512) 424-6900

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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 31. AGENCY PROCEDURES

13 TAC §31.4

The Texas Commission on the Arts adopts an amendment to §31.4, concerning Committees, without changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8239) and will not be republished.

Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously withdraws the emergency amendment to §31.4.

The purpose of the adopted amendment is to reflect agency restructuring and its goals and strategies.

No comments were received regarding adoption of the amended rule.

The amendment is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800057
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 27, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 936-6564

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CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts (commission) adopts the repeal and replacement of §35.1 and §35.2, concerning a guide to operations, programs, and services, without changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8240) and will not be republished.

Elsewhere in this issue of the *Texas Register*, the commission contemporaneously withdraws the emergency repeal and replacement of §35.1 and §35.2 on an emergency basis.

The purpose of the adopted repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended October 2007.

No comments were received regarding adoption of the repealed rules.

13 TAC §35.1, §35.2

The repeals are adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 7, 2008.

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Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 27, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 936-6564

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13 TAC §35.1, §35.2

The new sections are adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts

with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 7, 2008.

TRD-200800059
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
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Proposal publication date: November 16, 2007
For further information, please call: (512) 936-6564

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts the repeal of §25.53 relating to Emergency Operations Plan with no changes to the text as proposed and adopts new §25.53 relating to Electric Service Emergency Operations Plans with changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6708). The commission also amends Chapter 25, Subchapter C, Quality of Service, by changing the title to Infrastructure and Reliability. New §25.53 will establish the minimum requirements for emergency operations plans maintained by market entities. Project Number 34202 is assigned to this proceeding.

Municipally owned utilities have historically provided information regarding emergency operations to the commission on a voluntary basis, and they are encouraged to continue this practice. Such information may include emergency contacts, status reports during emergency events (either directly or through local emergency operations centers), and summaries or copies of emergency operations plans. A complete copy of the emergency operations plan should be made available at the main office of each municipally owned utility for inspection by the commission or commission staff upon request.

On October 29, 2007, the commission received comments on the proposed repeal and new section from AEP Texas North Company, AEP Texas Central Company, and Southwestern Electric Power Company (AEP Companies); CenterPoint Energy Houston Electric, LLC (CenterPoint Energy); the City of Houston Office of Emergency Management; El Paso Electric Company (EPE); the Electric Reliability Council of Texas, Incorporated (ERCOT); Entergy Gulf States, Incorporated (EGSI); Fox Smolen and Associates, Incorporated (FSA); Oncor Electric Delivery (Oncor); the Retail Electric Provider Coalition (REP Coalition), which consisted of CPL Retail Energy, Direct Energy, Gexa Energy, Green Mountain Energy Company, Liberty Power, Reliant Energy, Strategic Energy, Stream Energy, TXU Energy, WTU Retail Energy, the Alliance for Retail Markets, and the Texas Energy Association for Marketers; South Texas Electric Cooperative, Incorporated, Jackson Electric Cooperative, Incorporated, Karnes Electric Cooperative, Incorporated, Magic Valley Electric Cooperative, Incorporated, Medina Electric Cooperative, Incorporated, Nueces Electric Cooperative, Incorporated, San Patricio Electric Cooperative, Incorporated, Victoria Electric Cooperative, Incorporated, and Wharton County Electric Cooperative, Incorporated (STEC and its distribution cooperative members); Southwestern Public Service Company (SPS); Texas Electric Cooperative, Incorporated (TEC); and Texas-New Mexico Power Company (TNMP).

On November 12, 2007 the commission received reply comments on the proposed repeal and new section from EPE, FPL Energy, Incorporated (FPLE), Pedernales Electric Cooperative, Incorporated (PEC), and TEC.

The commission posed two questions in this proceeding, which are listed below.

Question 1: To what extent are the minimum requirements for emergency operations plans described in proposed §25.53(c) duplicative of ERCOT's filing requirements for market participants?

AEP and CenterPoint Energy were not aware of any filing requirements for transmission and distribution utilities (TDUs) that would be considered duplicative.

Oncor stated that the only item that is duplicative of ERCOT's filing requirements is its Black Start Plan. Therefore, Oncor asserted that its filing with the commission should not include a section on its Black Start Plan.

STEC and its distribution cooperative members stated that STEC's distribution cooperative members are not required to file an emergency operations plan with ERCOT. As a qualified scheduling entity (QSE), STEC is required to file with ERCOT a "back-up plan for operation during emergencies." As a transmission and/or distribution service provider (TDSP), STEC is required to file a complete emergency plan with ERCOT. STEC noted that the plan filed with ERCOT does not address pandemics. Further, STEC asserted that the ERCOT requirements allow them to meet the requirements of the commission with relative ease.

The REP Coalition stated that REPs are not required to file an emergency operations plan with ERCOT.

Commission response

The commission declines to make changes to the rule in response to these comments since the EOP required by the rule is not unnecessarily duplicative. The intent of the rule is to ensure emergency preparedness. Contrary to Oncor's comment, the rule does not require an entity to include a section on Black Start Plans in its filing with the commission.

Question 2: Should electric utilities and REPs develop policies for disaster aid offerings for customers displaced by catastrophic events such as hurricanes and flooding (i.e., waiver of transfer fees and/or deposits)? If so, to what extent should those policies and offerings be memorialized in an electric utility's tariff or a REP's terms of service?

STEC and its distribution cooperative members supported the inclusion of disaster aid offerings, including the waiver of transfer fees and/or deposits, in electric utilities' tariffs. They also stated that the commission should urge REPs to include similar policies in their terms of service.

While SPS was not opposed to the idea of disaster aid offerings, they felt that this issue could be better addressed in a separate rulemaking proceeding. This would allow affected parties the opportunity to comment on more specific issues associated with this topic.

The REP Coalition opposed requiring REPs to make disaster aid offerings but argued that REPs have traditionally made such offerings following a catastrophic event. From a competitive perspective, the REP Coalition asserted that the waiver of transfer fees and/or deposits may allow for the acquisition of customers. Further, they asserted that such a requirement would contradict Public Utility Regulatory Act (PURA) §39.001(d).

EGSI opposed the idea of a disaster aid offering, including the waiver of fees. They argued that a "blanket waiver" would result in administrative issues and would force its shareholders to absorb the costs deferred from customers. EGSI believed that the entities responsible for providing assistance to citizens following a catastrophic event are social and governmental agencies. They further argued that rather than requiring utilities to establish policies or make tariff revisions, the commission should issue emergency rules or orders stating that certain substantive rules are suspended following a disaster proclamation by the governor.

Oncor urged the commission not to require utilities to establish formal disaster aid offerings. They argued that utilities have traditionally offered assistance to customers during disasters, including hurricane and flooding events. Further, they asserted that the definition of a catastrophic event would need to be clarified. Similar to EGSI's comments, Oncor suggested that the determination of what constitutes a disaster is at the governor's discretion.

AEP Companies and EPE believed that each catastrophic event presents unique challenges for customers and responses to those challenges should fit the needs of customers during a given situation. Therefore, they did not support the inclusion of disaster aid offerings in a utility's tariff. EPE also stated that the commission's existing customer protection rules adequately protect customers during a disaster.

CenterPoint Energy stated that if the commission adopted disaster aid offerings, it should exempt unbundled TDUs from these requirements.

Commission response

Market entities have traditionally responded in a positive manner following an emergency event, and the commission would encourage market entities to continue meeting customer needs following an event. Therefore, the commission declines mandating such tariff or terms of service revisions.

Subsection (b)

FPLE expressed concern that the requirement to file an affidavit imposes a strict liability requirement for a market entity to follow its EOP.

Commission response

The affidavit required by final rule subsection (c)(1)(H) requires an affirmation about commitment to follow the EOP in order to help ensure that the market entity has adequately prepared for an emergency. However, the affirmation is not intended to preclude deviations from the EOP during the course of an emergency to the extent such deviations are appropriate under the circumstances. Further, the commission does not oppose the affidavit being signed by a local operation's officer and has deleted the term "senior" from subsection (c)(1)(H), (c)(2)(F), and (j)(2) of the rule.

TNMP endorsed filing an EOP summary plan but not a detailed EOP plan. SPS proposed the deletion of the term "comprehensive" in the first sentence because they are concerned about confidentiality. However, they did support filing a "general" description of their EOP plan. FPLE also expressed concern about confidentiality of EOP plans filed pursuant to subsection (b). FPLE, as the largest renewable energy generator in the state, would be willing to supply the commission with enough information to assess market-wide emergency readiness without compromising security-sensitive information regarding the state's critical infrastructure.

Commission response

The commission does not expect a market entity to submit confidential information in its comprehensive summary of its emergency operations plan. A "comprehensive summary" means that all aspects of emergency operations are addressed in a market entity's emergency plan summary submitted to the commission.

The commission has amended subsection (b) to permit filing the EOP in lieu of a comprehensive summary. If a market entity does file confidential information, §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials) addresses the manner in which the confidential information should be filed.

FPLE stated that the requirements proposed in subsection (c)(2) may not be fully implemented by all market entities by May 1, 2008. Therefore, FPLE proposed filing a status report about the items that need to be included but that they should not be required to file a full summary until December 31, 2008.

Commission response

The commission declines to make this change. Market entities have sufficient time to meet the May 1, 2008 deadline. Furthermore, the commission set the required filing date to ensure adequate preparedness prior to hurricane season.

Oncor argued that providing a summary of a Black Start Plan would be duplicative of ERCOT's filing requirements; and therefore, Oncor provided specific language to exclude the Black Start Plan.

Commission response

A summary of a Black Start Plan is not included in the list of requirements under subsection (c). The commission did not intend for market entities to file a summary of this plan. Therefore, Oncor's suggested rule language is unnecessary.

The REP Coalition proposed moving the affidavit requirement to subsection (c).

Commission response

REP Coalition's proposed change creates consistency throughout subsection (c) since REPs and ERCOT are only required to file an affidavit, as outlined in subsections (c)(3) and (c)(4). Therefore, the commission adopts this change.

Subsection (c)(1)(A)

FSA provided specific language for including critical care customers and providing for coordination between utilities and governmental entities. TEC objected to FSA's suggestion that governmental entities be included in the proposed rule and any

involvement of governmental entities should be addressed in §25.497, not in the current rulemaking proceeding.

Commission response

FSA's suggestions are beyond the scope of the rule, and the commission declines to make changes to subsection (c)(1)(A).

TNMP agreed with FSA that a database of critical load customers is crucial but argued that the list of critical load customers should not be filed with the commission.

Commission response

The commission agrees with TNMP's assessment. The commission is primarily concerned with the process for registering and contacting critical load customers. Therefore, the commission will not add a requirement to the rule that utilities must file a list of critical load customers with the commission.

Subsection (c)(1)(B)

TNMP stated that the filing of an EOP by the May 1, 2008 deadline is feasible. FSA provided specific language for including critical care customers and providing for coordination between utilities and governmental entities. TEC objected to FSA's suggestion that governmental entities be included in the proposed rule and any involvement of governmental entities should be addressed in §25.497, not in the current rulemaking proceeding.

Commission response

As stated previously, the commission believes that the suggestions offered by FSA are beyond the scope of the rule and declines to make the suggested changes to subsection (c)(1)(B).

Subsection (c)(1)(F)

Oncor and FPLE stated that the phrase "hurricane evacuation zone" should be more defined or better referenced.

Commission response

The commission agrees with Oncor's and FPLE's comments, and has changed the rule accordingly.

Subsection (c)(1)(G)

Commission response

The Texas 9-1-1 Agencies filed comments in response to proposed §26.51 in Project Number 34594, *Rulemaking to Repeal P.U.C. Substantive Rule §26.51 and Propose New §26.51 Relating to Reliability of Operations of Telecommunications Providers* and recommended the following language be added: (G) Following the (a)nnual (d)rill, the utility shall assess the effectiveness of the (d)rill and modify its emergency operations plan as needed. The commission believes the addition of this language is appropriate for §25.53 as well, and adding this language to §25.53 will make it more consistent with §26.51.

Subsection (c)(1)(H)

The REP Coalition provided specific language regarding the incorporation of the affidavit requirement in subsection (c)(1), which would require the addition of subsection (c)(1)(H). They suggested this would create consistency throughout subsection (c), considering that REPs and ERCOT are required to only file an affidavit.

Commission response

The commission agrees with the addition of subsection (c)(1)(H) for the reasons indicated in response to the REP Coalition's comments in subsection (b). REP Coalition's proposed change more closely aligns the requirements throughout subsection (c) since REPs and ERCOT are only required to file an affidavit, as outlined in subsections (c)(3) and (c)(4). Therefore, the commission adopts this change.

The affidavit required by final rule subsection (c)(1)(H) requires an affirmation about commitment to follow the EOP, in order to help ensure that the market entity has adequately prepared for an emergency. However, the affirmation is not intended to preclude deviations from the EOP during the course of an emergency to the extent such deviations are appropriate under the circumstances. Further, the commission does not oppose the affidavit being signed by a local operation's officer and has deleted the term "senior" from subsection (c)(1)(H) of the rule.

Subsection (c)(1)(I)

The City of Houston suggested language that would require certification of coordination by TDUs and electric utilities with their local emergency management coordinators.

Commission response

The commission disagrees with the City of Houston. While the commission would encourage local emergency management coordinators to work with market entities on issues related to emergency management, requiring a utility to obtain certification from a municipality is outside the scope of this rulemaking and exceeds the commission's jurisdiction.

Subsection (c)(2)(E)

FPLE stated that the phrase "hurricane evacuation zone" should be more defined or referenced.

Commission response

The commission agrees with FPLE's assessment, and has made changes to the rule accordingly.

Subsection (c)(2)(F)

The REP Coalition provided specific language regarding the incorporation of the affidavit requirement in subsection (c)(2), which would require the addition of subsection (c)(2)(F).

Commission response

The commission agrees with the addition of subsection (c)(2)(F) for the reasons indicated the REP Coalition's comments in subsection (b). The REP Coalition's proposed change creates consistency throughout subsection (c) since REPs and ERCOT are only required to file an affidavit, as outlined in subsections (c)(3) and (c)(4). Therefore, the commission adopts this change.

The affidavit required by final rule subsection (c)(2)(F) requires an affirmation about commitment to follow the EOP, in order to help ensure that the market entity has adequately prepared for an emergency. However, the affirmation is not intended to preclude deviations from the EOP during the course of an emergency to the extent such deviations are appropriate under the circumstances. Further, the commission does not oppose the affidavit being signed by a local operation's officer and has deleted the term "senior" from subsection (c)(2)(F) of the rule.

Subsection (c)(2)(G)

Commission response

The Texas 9-1-1 Agencies filed comments in response to proposed §26.51 in Project Number 34594, *Rulemaking to Repeal P.U.C. Substantive Rule §26.51 and Propose New §26.51 Relat-*

ing to Reliability of Operations of Telecommunications Providers and recommended the following language be added: (G) Following the (a)nnual (d)rill, the utility shall assess the effectiveness of the (d)rill and modify its emergency operations plan as needed. The commission believes the addition of this language is appropriate for §25.53 as well, and adding this language to §25.53 will make it more consistent with §26.51.

Subsection (c)(3)

FPLE stated that requiring Option 2 REPs to file an EOP is unnecessary, because Option 2 REPs do not provide retail service to the general public.

Commission response

REPs are only required to file an affidavit affirming that they have a business continuity plan (BCP). The commission recognizes the role of REPs during an emergency event and has set the requirements accordingly.

The REP Coalition asserted that REPs are required to file only an affidavit concerning their business continuity plans, and references to §25.485 and §25.497 should be eliminated because they are not relevant to a business continuity plan.

Commission response

The commission agrees with the REP Coalition's comments, and has made changes to the rule accordingly.

Subsection (c)(4)

The REP Coalition suggested changes to reflect that ERCOT is required to file only an affidavit.

Commission response

The commission agrees with this comment, and has changed the rule accordingly.

Subsection (d)

Oncor and FPLE requested that the commission allow participation in ERCOT's annual drills to meet the requirement set forth in subsection (d).

Commission response

The commission agrees with Oncor's and FPLE's suggestions to allow market entities to meet the drill requirement through participation in ERCOT's annual drill. Rather than specifically citing ERCOT's drill in the rule, the commission has amended subsection (d) to allow market entities to participate in an annual drill in lieu of conducting their own internal drills. The commission believes this option allows more alternatives for meeting this requirement.

TNMP requested that the 30-day notification prior to the date of the annual drill be reduced to 14 days.

Commission response

The commission has reduced the notification deadline to 21 days, which is necessary to provide commission staff adequate time to prepare to attend the drills.

The City of Houston requested that annual drills be conducted in coordination with local exercise programs and that a market entity in a hurricane evacuation zone be required to participate in local hurricane exercises.

Commission response

The commission declines to make these changes, because they could be overly burdensome. However, the commission encourages market entities to coordinate exercises with the local exercise program wherever feasible. This could include participation in a local hurricane exercise in the coastal regions in coordination with the Texas Engineering Extension Service (TEEX).

Subsection (e)

TNMP requested that the commission provide more detail concerning emergency contact information and the intervals at which it is required.

Commission response

The commission expects to initiate another rulemaking to require contact information to be submitted in one annual report by each market entity.

The City of Houston requested that the rule require the commission to forward market entity emergency contact information to state and local emergency management coordinators.

Commission response

The commission disagrees with the City of Houston's proposal for the commission to provide emergency contact information to state and local emergency coordinators upon receipt from market entities. This information will be kept on file at the commission in a company database and the commission can make the emergency contact information available to state and local emergency management coordinators upon request.

Subsection (f)

TMNP requested a more specific emergency event reporting schedule. In its reply comments, EPE agreed with TNMP's proposed rule language regarding outage reporting during an emergency. EPE further opined that submitting detailed information during the course of a major event might be difficult and suggested that TNMP's proposed rule language allows utilities adequate flexibility while trying to restore power and supply information to the commission.

Commission response

TNMP's proposed language is contained in §25.52 (relating to Quality of Service) of this title. The commission recognizes that emergency conditions may cause reporting requirements to change over the course of an emergency. In that respect, TNMP's proposed language addresses the need for flexibility. The commission, however, must be able to fulfill its reporting responsibilities during an emergency event while not being overly burdensome on the market entities working to restore power in the impacted areas. To that end, the commission is amending subsection (f) in attempts to strike an appropriate balance that represents the commission's expectations of market entities and the expectations that are placed upon the commission.

The REP Coalition proposed to subject ERCOT to the reporting requirements of subsection (f) and proposed non-substantive changes to the language.

Commission response

ERCOT currently provides notification to the commission for situations outlined in its Crisis Communications Procedures and Section 5.6, Emergency and Short Supply Operation, of its protocols. The commission believes it is unnecessary to include ERCOT in subsection (f) of the rule. The commission also de-

clines to make the non-substantive changes proposed by the REP Coalition.

Subsection (g)

The City of Houston suggested municipalities with populations greater than 100,000 should receive a copy of a market entity's EOP.

FSA argued that the market entities that serve in a particular municipality or county should include local emergency management coordinators in the process of developing EOPs. In its reply comments, EPE argued that it would be unduly burdensome for utilities to include municipal and county governments in the process of drafting an emergency operations plan (EOP). Further, EPE opined that this may result in two separate EOPs being drafted, one to meet the requirements of the proposed rule and one to meet the requirements of a local jurisdiction. EPE stated that it continually works with local emergency officials but believed this suggestion was outside the scope of this rulemaking and urged the commission to reject this request.

Commission response

The commission declines to adopt the City of Houston's and FSA's proposals. While the commission expects utilities to work with local emergency management coordinators and governments to the extent appropriate, imposing specific obligations at this time without further consideration could result in overly broad and burdensome requirements.

Subsection (h)

Commission response

Proposed subsection (h) addressed the filing of confidential information. What information in a report filed with the commission is exempt from public disclosure is addressed by Texas Government Code, Chapter 552, and the procedures for filing documents confidentially are outlined in §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). Therefore, subsection (h) has been deleted.

Subsection (i)

The REP Coalition stated that the following sentence is redundant: "Each market entity shall comply with the filing requirements set forth in subsection (b) of this section."

Commission response

The commission agrees, and has deleted all of proposed subsection (i), because it is superfluous.

Subsection (j)(2)

Commission response

Consistent with its change to subsection (b) and its action on §26.51 of this title in Project Number 34594, *Rulemaking to Repeal P.U.C. Substantive Rule §26.51 and Propose New §26.51 Relating to Reliability of Operations of Telecommunications Providers*, the commission has amended subsection (j)(2) to permit electric cooperatives to file an EOP in lieu of a comprehensive summary.

The affidavit required by final rule subsection (j)(2) requires an affirmation about commitment to follow the EOP, in order to help ensure that the electric cooperative has adequately prepared for an emergency. However, the affirmation is not intended to preclude deviations from the EOP during the course of an emergency to the extent such deviations are appropriate under the circumstances. Further, the commission does not oppose the affidavit being signed by a local operation's officer and has deleted the term "senior" from subsection (j)(2) of the rule.

Subsections (j)(3)(A) and (B)

FSA commented that subsections (j)(3)(A) and (j)(3)(B) should be amended to emphasize the importance of critical care customers. PEC asserted that §25.497 does not apply to cooperatives; therefore, this subsection should be deleted or made voluntary. TEC argued that FSA's proposal to include governmental entities in the process of registering critical load customers is beyond the scope of this rulemaking. TEC, however, did not oppose including a description of the process for registering critical load customers in an EOP.

Commission response

The commission previously addressed the substance of FSA's comments. Concerning PEC's comments, the reference to §25.497(a) is only for the purpose of defining critical load customers. Therefore, the commission declines to delete the reference. The commission recognizes that electric cooperatives are not required to maintain a registry of critical load customers. The commission has therefore modified subsection (j)(3)(A) accordingly.

Subsection (j)(3)(F)

PEC suggested that the phrase "hurricane evacuation zone" should be more defined or referenced.

Commission response

The commission agrees with PEC's assessment and has changed the rule accordingly.

Subsection (j)(3)(J)

Commission response

The Texas 9-1-1 Agencies filed comments in response to proposed §26.51 in Project Number 34594, *Rulemaking to Repeal P.U.C. Substantive Rule §26.51 and Propose New §26.51 Relating to Reliability of Operations of Telecommunications Providers* and recommended that utilities should conduct an after action review following a drill. Electric cooperatives are required to conduct an annual preparedness review and a modification of their EOPs following the review may be appropriate. Therefore, the commission has added subsection (j)(3)(J) to reflect this additional requirement.

Subsections (j)(4) - (j)(7)

The City of Houston offered comments on the proposed language in subsections (j)(4) through (j)(7) that would enhance communication between electric cooperatives and local emergency management coordinators. It was suggested that cooperatives should include local emergency management coordinators in their annual preparedness review, should provide contact information to local emergency management coordinators, and should provide a copy of their emergency operations plans to local emergency management coordinators if the local jurisdiction has a population greater than 100,000 people.

Commission response

While the commission expects electric cooperatives to work with local emergency management coordinators and governments to the extent appropriate, imposing specific obligations at this time without further consideration could result in overly broad and burdensome requirements.

Subsection (j)(6)

TNMP offered language regarding outage reporting during an emergency in subsection (f). EPE commented that TNMP's proposed rule language allows utilities adequate flexibility while trying to restore power and supply information to the commission.

Commission response

TNMP's proposed language is contained in §25.52 (relating to Quality of Service) of this title. The commission recognizes that emergency conditions may cause reporting requirements to change over the course of an emergency. In that respect, TNMP's proposed language addresses the need for flexibility and should also be considered in subsection (j)(6) to ensure consistency throughout the rule. The commission, however, must be able to fulfill its responsibilities during an emergency event while not being overly burdensome on the electric cooperatives working to restore power in the impacted areas. To that end, the commission is amending subsection (j)(6) in attempts to strike an appropriate balance that represents the commission's expectations of electric cooperatives and the expectations that are placed upon the commission.

Subsection (j)(8)

Commission response

Consistent with its deletion of proposed subsection (h), the commission has deleted subsection (j)(8).

Subsection (j)(9)

TEC wished to clarify its position regarding the jurisdiction of the commission with regards to reporting requirements and operational standards. TEC agreed that PURA §41.004(5)(A) grants the commission the authority "to require reports of electric cooperative operations only to the extent necessary to: (A) ensure the public safety. . ." By definition, a comprehensive summary of an emergency operations plan is an example of such a report. TEC cautioned against the use of language in the proposed rule that would assume that the commission has the authority to "modify an electric cooperative's retail operations." To that end, TEC argued that its interpretation of subsection (j)(9) led to the conclusion that a review of a cooperative's summary and subsequent recommendations by commission staff could have an impact on a cooperative's retail operations. Further, TEC stated that the authority to "establish and enforce service quality standards, reliability standards, and consumer safeguards designed to protect retail electric customers" is properly vested in the hands of a cooperative's board of directors, as outlined in PURA §41.055(7).

Commission response

Consistent with its deletion of proposed subsection (i), the commission has deleted subsection (j)(9), which therefore resolves TEC's concern with that subsection.

All comments, including those not specifically discussed herein, were fully considered by the commission.

SUBCHAPTER C. QUALITY OF SERVICE

16 TAC §25.53

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §14.001, which provides the commission the power to regulate a public utility and to do anything designated or implied to carry out that power; §14.003, which provides the commission with the authority to require a public utility to file a report regarding information related to the utility and to establish the form, time, and frequency of the report; §14.151, which provides the commission with the authority to prescribe the form of the records to be kept by a public utility; §14.153, which provides the commission with the authority to adopt rules governing the communication between the regulatory authority and the public utility; §31.001, which states that PURA Subtitle B was enacted to protect the public interest in establishing an adequate regulatory system to assure operations and services that are just and reasonable; 37.001, defines an electric utility to include an electric cooperative for purposes of Chapter 37; §37.151, which provides that a certificate holder shall serve all customers within the certificated area and shall provide continuous and adequate service within that certificated area; §38.001, which provides that electric utilities and electric cooperatives shall furnish service that is safe, adequate, efficient, and reasonable; §38.002, which provides the commission with the authority to adopt reasonable standards for an electric utility to follow, to adopt standards for measuring the quantity and quality of service, to adopt rules for examining, testing, and measuring a service, and to adopt rules to ensure the accuracy of equipment; §38.005, which requires the commission to implement service quality and reliability standards relating to the delivery of electricity to retail customers; §38.021, which prohibits an electric utility from providing an unreasonable preference to a person in a classification; §38.022, which prohibits discrimination and restriction on competition; §38.071, which provides the commission with authority to order an electric utility to provide improvements in its service; §39.101, which provides the commission with the authority to ensure that customer protections are established to entitle a customer to safe, reliable, and reasonably priced electricity; and §41.004, which provides the commission with jurisdiction to require electric cooperatives to report to the commission to the extent necessary to ensure the public safety.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.003, 14.151, 14.153, 31.001, 37.001, 37.151, 38.001, 38.002, 38.005, 38.021, 38.022, 38.071, 39.101 and 41.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 4, 2008.

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Adriana A. Gonzales
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Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §25.53

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA), which provides the commission with the authority to

make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §14.001, which provides the commission the power to regulate a public utility and to do anything designated or implied to carry out that power; §14.003, which provides the commission with the authority to require a public utility to file a report regarding information related to the utility and to establish the form, time, and frequency of the report; §14.151, which provides the commission with the authority to prescribe the form of the records to be kept by a public utility; §14.153, which provides the commission with the authority to adopt rules governing the communication between the regulatory authority and the public utility; §31.001, which states that PURA Subtitle B was enacted to protect the public interest in establishing an adequate regulatory system to assure operations and services that are just and reasonable; §37.001, defines an electric utility to include an electric cooperative for purposes of Chapter 37; §37.151, which provides that a certificate holder shall serve all customers within the certificated area and shall provide continuous and adequate service within that certificated area; §38.001, which provides that electric utilities and electric cooperatives shall furnish service that is safe, adequate, efficient, and reasonable; §38.002, which provides the commission with the authority to adopt reasonable standards for an electric utility to follow, to adopt standards for measuring the quantity and quality of service, to adopt rules for examining, testing, and measuring a service, and to adopt rules to ensure the accuracy of equipment; §38.005, which requires the commission to implement service quality and reliability standards relating to the delivery of electricity to retail customers; §38.021, which prohibits an electric utility from providing an unreasonable preference to a person in a classification; §38.022, which prohibits discrimination and restriction on competition; §38.071, which provides the commission with authority to order an electric utility to provide improvements in its service; §39.101, which provides the commission with the authority to ensure that customer protections are established to entitle a customer to safe, reliable, and reasonably priced electricity; and §41.004, which provides the commission with jurisdiction to require electric cooperatives to report to the commission to the extent necessary to ensure the public safety.

§25.53. Electric Service Emergency Operations Plans.

(a) Application. Unless the context clearly indicates otherwise, this section is applicable to electric utilities, transmission and distribution utilities (TDUs), power generation companies (PGCs), retail electric providers (REPs), and the Electric Reliability Council of Texas (ERCOT), collectively referred to as "market entities," and electric cooperatives ("cooperatives") and shall refer to the definitions provided in the Public Utility Regulatory Act §11.003 and §31.002. For the purposes of this section, market entities and cooperatives are those operating within the State of Texas.

(b) Filing requirements. Each market entity shall file with the commission a copy of its emergency operations plan or a comprehensive summary of its emergency operations plan, as required in subsection (c) of this section, by May 1, 2008. To the extent significant changes are made to an emergency operations plan, the market entity shall file the revised plan or a revision to the comprehensive summary that appropriately addresses the changes to the plan no later than 30 days after such changes take effect.

(c) Information to be included in the emergency operations plan.

(1) TDUs and electric utilities shall include in their emergency operations plans, but are not limited to, the following:

(A) A registry of critical load customers, as defined in §25.497(a) of this title (relating to Critical Care Customers), directly served. This registry shall be updated as necessary but, at a minimum, annually. The description filed with the commission shall include the location of the registry, the process for maintaining an accurate registry, the process for providing assistance to critical load customers in the event of an unplanned outage, the process for communicating with the critical load customers, and a process for training staff with respect to serving critical load customers;

(B) A communications plan that describes the procedures for contacting the media, customers, and critical load customers directly served as soon as reasonably possible either before or at the onset of an emergency affecting electric service. The communications plan should also address its telephone system and complaint-handling procedures during an emergency;

(C) Curtailment priorities, procedures for shedding load, rotating black-outs, and planned interruptions;

(D) Priorities for restoration of service;

(E) A plan to ensure continuous and adequate service during a pandemic; and

(F) A hurricane plan, including evacuation and re-entry procedures (if facilities are located within a hurricane evacuation zone, as defined by the Governor's Division of Emergency Management).

(G) Following the annual drill, the utility shall assess the effectiveness of the drill and modify its emergency operations plan as needed.

(H) An affidavit from the market entity's operations officer indicating that all relevant operating personnel within the market entity are familiar with the contents of the emergency operations plan; and such personnel are committed to following the plan and the provisions contained therein in the event of a system-wide or local emergency that arises from natural or manmade disasters except to the extent deviations are appropriate under the circumstances during the course of an emergency.

(2) Electric utilities that own or operate electric generation facilities and PGCs shall include in their emergency operations plans, but are not limited to, the following:

(A) A summary of power plant weatherization plans and procedures;

(B) A summary of alternative fuel and storage capacity;

(C) Priorities for recovery of generation capacity;

(D) A pandemic preparedness plan; and

(E) A hurricane plan, including evacuation and re-entry procedures (if facilities are located within a hurricane evacuation zone, as defined by the Governor's Division of Emergency Management).

(F) An affidavit from the market entity's operations officer indicating that all relevant operating personnel within the market entity are familiar with the contents of the emergency operations plan; and such personnel are committed to following the plan and the provisions contained therein in the event of a system-wide or local emergency that arises from natural or manmade disasters except to the extent deviations are appropriate under the circumstances during the course of an emergency.

(G) Following the annual drill, the utility shall assess the effectiveness of the drill and modify its emergency operations plan as needed.

(3) REPs shall include in their filing with the commission, but are not limited to, an affidavit from an officer of the REP affirming that it has a plan that addresses business continuity should its normal operations be disrupted by a natural or manmade disaster, a pandemic, or a State Operations Center (SOC) declared event.

(4) ERCOT shall include in its filing with the commission, but is not limited to, an affidavit from a senior operations officer affirming the following:

(A) ERCOT maintains Crisis Communications Procedures that address procedures for contacting media, governmental entities, and market participants during events that affect the bulk electric system and normal market operations and include procedures for recovery of normal grid operations;

(B) ERCOT maintains a business continuity plan that addresses returning to normal operations after disruptions caused by a natural or manmade disaster, or a SOC declared event; and

(C) ERCOT maintains a pandemic preparedness plan.

(d) Drills. Each market entity shall conduct or participate in an annual drill to test its emergency procedures if its emergency procedures have not been implemented in response to an actual event within the last 12 months. If a market entity is in a hurricane evacuation zone (as defined by the Governor's Division of Emergency Management), this drill shall also test its hurricane plan/storm recovery plan. The commission should be notified 21 days prior to the date of the drill.

(e) Emergency contact information. Each market entity shall submit emergency contact information in a form prescribed by commission staff by May 1 of each calendar year. Notification to commission staff regarding changes to its emergency contact information shall be made within 30 days. This information will be used to contact market entities prior to and during an emergency event.

(f) Reporting requirements. Upon request by the commission or commission staff during a SOC inquiry or SOC declared emergency event, affected market entities shall provide updates on the status of operations, outages and restoration efforts. Updates shall continue until all event-related outages are restored or unless otherwise notified by commission staff.

(g) Copy available for inspection. A complete copy of the emergency operations plan shall be made available at the main office of each market entity for inspection by the commission or commission staff upon request.

(h) Electric cooperatives.

(1) Application. This subsection is applicable to electric cooperatives, as defined in the Public Utility Regulatory Act §11.003, that operates, maintains or controls in this state a facility to provide retail electric utility service or transmission service.

(2) Reporting Requirements. Each electric cooperative shall file with the commission a copy of its emergency operations plan or a comprehensive summary of its emergency operations plan by May 1, 2008. The filing shall also include an affidavit from the electric cooperative's operations officer indicating that all relevant operating personnel within the electric cooperative are familiar with the contents of the emergency operations plan; and such personnel are committed to following the plans and the provisions contained therein in the event of a system-wide or local emergency that arises from natural or manmade disasters, except to the extent deviations are appropriate under the circumstances during the course of an emergency. To the extent significant changes are made to an emergency operations plan, the electric cooperative shall file the revised plan or a revision to the comprehensive summary that appropriately addresses the changes to the plan no later than 30 days after such changes take effect.

(3) Information to be included in the emergency operations plan. Each electric cooperative's emergency operations plan shall include, but is not limited to, the following:

(A) A registry of critical load customers, as defined in §25.497(a) of this title, directly served, if maintained by the electric cooperative. This registry shall be updated as necessary but, at a minimum, annually. The description filed with the commission shall include the location of the registry, the process for maintaining an accurate registry, the process for providing assistance to critical load customers in the event of an unplanned outage, the process for communicating with the critical load customers, and a process for training staff with respect to serving critical load customers;

(B) A communications plan that describes the procedures for contacting the media, customers, and critical load customers directly served as soon as reasonably possible either before or at the onset of an emergency affecting electric service. The communications plan should also address its telephone system and complaint-handling procedures during an emergency;

(C) Curtailment priorities, procedures for shedding load, rotating black-outs, and planned interruptions;

(D) Priorities for restoration of service;

(E) A plan to ensure continuous and adequate service during a pandemic;

(F) A hurricane plan, including evacuation and re-entry procedures (if facilities are located within a hurricane evacuation zone, as defined by the Governor's Division of Emergency Management);

(G) A summary of power plant weatherization plans and procedures;

(H) A summary of alternative fuel and storage capacity; and

(I) Priorities for recovery of generation capacity.

(J) Following the annual preparedness review, the electric cooperative shall assess the effectiveness of the review and modify its emergency operations plan as needed.

(4) Preparedness Review. Each electric cooperative shall conduct an annual review of its emergency procedures with key emergency operations personnel if its emergency procedures have not been implemented in response to an actual event within the last 12 months. If the electric cooperative is in a hurricane evacuation zone, this review shall also address its hurricane plan/storm recovery plan. The commission shall be notified 30 days prior to the date of the review.

(5) Emergency contact information. Each electric cooperative shall submit emergency contact information to the commission by May 1 of each year.

(6) Reporting requirements. Upon request by the commission or commission staff during a SOC inquiry or SOC declared emergency event, affected electric cooperative shall provide updates on the status of operations, outages and restoration efforts. Updates shall continue until all event-related outages are restored or unless otherwise notified by commission staff.

(7) Copy available for inspection. A complete copy of the emergency operations plan shall be made available at the main office of each electric cooperative for inspection by the commission or commission staff upon request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

(Editor's note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.214 is not included in the print version of the Texas Register. The figure is available in the on-line version of the January 18, 2008, issue of the Texas Register.)

The Public Utility Commission of Texas (commission) adopts an amendment to §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities with changes to the proposed text as published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7364). The adopted amendment will establish a definition for a retail seasonal agricultural customer in Chapter One of the Pro-Forma Retail Delivery Tariff for Transmission and Distribution Service Providers (TDSPs) (Pro-Forma Retail Delivery Tariff) to ensure that the seasonal agricultural customer exemption, currently within each TDSP's tariff, is consistently applied to customers by each TDSP. This amendment is adopted under Project Number 34561.

The commission received comments on the proposed amendment from AEP Texas Central Company (TCC) and AEP Texas North Company (TNC); CenterPoint Houston Electric, LLC; Oncor Electric Delivery Company, LLC; and Texas-New Mexico Power Company (Joint Transmission Distribution Utilities (TDUs)); the Texas Cotton Ginners' Association (TCGA); the Texas Grain and Feed Association (TGFA); and TXU Retail Energy Company, LLC (TXU Energy). Reply comments were received from Joint TDUs, TCGA, and TGFA.

In addition to the proposed language, the commission requested that parties submit comments on the following questions:

(1) The proposed definition of "retail seasonal agricultural customer" includes the requirement that the customer's energy consumption be "subject to significant seasonal variation." Should the definition specify what constitutes significant seasonal variation?

(2) Should the definition include a specific time limit on the number of months that an agricultural customer can reach peak usage in order to be considered seasonal? Should the definition specify whether peak usage may be reached in more than one season, such as one summer peak and one winter peak? Should the definition specify a threshold amount that the peak(s) must be above the customer's average usage?

(3) The proposed definition currently includes irrigation that meets the requirements of the definition as an example of a possible retail seasonal agricultural customer. Is this an appropriate inclusion?

(4) Are there any customers that the proposed definition would include that should not be included? Are there any customers that the proposed definition would exclude that should be included?

Question 1

Joint TDUs agreed that significant seasonal variation in electric consumption of agricultural customers is the major determination for qualifying for the exemption, but stated that the definition needs to include a more specific term to provide more clarity and precision to the definition's application. Broad language may result in multiple interpretations, leading to non-uniform application. Additionally, Joint TDUs noted customers with peripheral non-seasonal loads behind the same point of delivery as the seasonal loads may not experience as significant an energy shift as they will a seasonal kilowatt (kW) demand shift because many seasonal loads are very large, but operate only for short periods of time. Joint TDUs suggested a definition, which they stated takes into consideration variations in a typical growing season and the impact weather may have on those seasons. The Joint TDUs submitted that the adopted definition should set the qualifications for the seasonal variation in kW or kilovolt amperes (kVA) demand, not energy, and that the seasonal variations should be contained within a narrow timeframe. Joint TDUs suggested a timeframe that does not exceed four months in a calendar year and requested that each seasonal agricultural group identify its season so that it can be determined if the appropriate time frame can be more precisely defined.

TCGA and TGFA stated that it is unnecessary to define significant seasonal variation. TCGA commented that it is important to consider that the definition refers to groups of customers as opposed to individual customers, and gave two examples. Cotton gins typically operate for 60 to 120 days during a given year, during which their load is generally from 800 kW to over 1,500 kW. When the season is over, the gin remains idle, with only lighting and maintenance equipment comprising load of 10 kW to 50 kW. Similarly, irrigation customers will run their pumps during the growing season when various crops are being watered then will remain idle the rest of the year. Each of these customers performs a specific task that takes place during a specific time of the year, and the pattern is recurring and distinct. TCGA stated that grain dryers and rice dryers exhibit similar patterns. TCGA compared this to non-seasonal agricultural customers such as a feed mill producing cattle rations, which would run and have similar load throughout the year. TCGA stated that, under the proposed definition, if a group of customers can show variations in their annual operating characteristics that are similar to the four named groups, the rule would allow their inclusion.

TGFA commented that it would be difficult to craft a definition for significant seasonal variation that would fit every circumstance and that a review of the bills of the affected customers demonstrates that the variations are obvious. TGFA suggested that customers should be allowed to self-certify their load as quali-

fying for the significant seasonal variation. TGFA asserted that this method would avoid the pitfalls inherent in writing specification into the definition that could prevent the application of the exemption because of unanticipated events such as weather, growing patterns, or other characteristics that are unique to agricultural customers. In reply comments, TGFA elaborated and stated that the commission should establish a procedure that allows these customers to file an affidavit with their Retail Electric Provider (REP), stating that they are retail seasonal agricultural customers, which the REP would forward to the TDU within five days of receipt. TGFA recommended that the exemption be granted with the next full billing cycle after receipt of the affidavit. Under this process, the TDU could deny the exemption if it found reason to believe the exemption should not be granted and would notify the REP of the denial, who would, in turn, notify the customer. The customer could appeal the TDU's determination to the commission. The exempted customer would be responsible for notifying the REP when changes in operations dictate that one or more of its premises no longer qualifies for the exemption.

Joint TDUs replied that, if sound rationale for adopting a definition of retail seasonal agricultural customer is to promote uniformity of application among utilities, it does not make sense to have a self-certifying approach.

Commission response

The commission agrees with TCFA and TGCA that it would be difficult to specifically describe significant seasonal variation to account for the different types and groups of customers that should fall under the definition. The commission further acknowledges that a specifically described variation unlikely would adapt to the unpredictability that those customers can experience because weather affects their operations and may unintentionally exclude customers that should be included. The commission agrees that it should be apparent in the bills or historical usage for a customer, whether the electric load has significant variations and is, therefore, a seasonal operation as contemplated by the definition. A new customer, through its REP, will need to provide the TDU with information that is sufficient to demonstrate that it meets the definition.

The commission agrees with the Joint TDUs that the rule should contemplate demand and amends the definition accordingly.

Question 2

Joint TDUs supported a specific peak period time limit and stated that, by setting a peak period time limit on a calendar year basis that should not exceed four months, one can avoid the need to address the various growing seasons. They added that it is important for maximum understanding, uniform application, and ease of administration that the definition have a peak time period limit based on a calendar year.

TCGA stated that, as outlined in their response to Question 1, the answers to the questions posed as Question 2 should be negative. TCGA stated that the definition relates to a distinct group of customers that operate seasonally; and if an arbitrary time limit is established, the result would be a great increase in the complexity of administering the rate. TCGA provided an example that the optimum harvest condition for the cotton industry is consistently dry weather, allowing farmers to harvest their cotton quickly, in which a gin might run for 90 days without stopping and then close for the season. Under this scenario, the gin would set a full demand for three or four billing cycles. However, in the following year, the conditions might be worse because of rain or snow; and the gin may have to start and stop depending upon weather conditions, which could stretch out over five or even six billing cycles. Once the gin in this bad-weather example exceeds an arbitrary threshold, the utility would have to remove them from the seasonal designation. The next year, the weather conditions could be optimal; and the customer would presumably re-qualify. TCGA stated that going back and forth from qualifying to non-qualifying on a customer-by-customer basis would be complex and frustrating for all parties. TCGA stated that the four customer groups listed under the proposed definition will have an off-season load that is either zero or a very small percentage of their on-season load, simply because of the way the units operate and that there is no need to establish a threshold amount for these customers.

TGFA commented that the definition should not include specific time limits, limitations on peak usage during one or more seasons, or a threshold peak usage. There are many different patterns for various seasonal agricultural products; and these patterns can vary from year to year, and within a single year. TGFA provided the example that, during a drought period, irrigation patterns will vary from a rainy period, but will still be seasonal in nature and will correspond to the planting and growing season of a specific agricultural product. In an alternate example, TGFA stated that the primary operations of rice dryers and storage usually begin towards the end of July or beginning of August and conclude around the beginning of September. The second, usually smaller crop is harvested beginning in October through sometime in December. These customers have two seasons, and their usage may vary year to year depending upon the size of crops in a given year. TGFA stated that the 2005 crop was 1,000,000 hundredweight; the 2006 crop was down 40% to 600,000 hundredweight; and the 2007 crop was down 16% to 500,000 hundredweight. TGFA stated that, as these examples show, the significant variations in growing, harvesting, and processing crops would make the limitations or refinements to the definition suggested by the question unnecessarily cumbersome at best and unworkable at worst.

Commission response

Based on the comments of TCFA and TGCA, the commission finds that it would be difficult to set a specific time limit on the number of months that an agricultural customer could reach peak usage, the number of seasons in which a peak usage may be reached, or a threshold amount that the peak must be above the customer's average usage in a way that would account for the different types and groups of customers that should fall under this definition, as well as the unpredictability that those customers can experience as weather affects their operations, without unintentionally excluding customers that should be included. The commission agrees that it should be apparent in the historical usage for a customer, whether the electric load has significant variations in load and is, therefore, a seasonal operation as contemplated by the definition. A new customer, through its REP, will need to provide the TDU with information that is sufficient to demonstrate that it meets the definition.

Question 3

Joint TDUs supported the inclusion of irrigation in the definition provided that it is specifically for agricultural crop production. They stated that there are currently many irrigation applications that do not relate to agricultural crop production, including golf courses, parks and road medians, and sports fields. Additionally, Joint TDUs stated that the proposed definition uses the phrase "producing and processing crops subsequent to their harvest" in

a context that may eliminate irrigation because all irrigation is prior to harvest. They recommended additional clarification to include irrigation applications for agricultural crop production.

TCGA stated that irrigation customers were a critical component of the original seasonal agricultural definition. TCGA commented that most agricultural customers are located in established areas where the distribution lines are already in place, where minimal growth is taking place. If the seasonal agricultural customer treatment is removed from either of the groups currently being served under this definition, their rates will increase significantly. If distribution rates are ratcheted for these customers, overall rates will increase to the point that alternative sources of energy would likely be utilized. TCGA stated that, in the case of irrigation customers, it is fairly simple to convert a well, so that it is powered by a reciprocating engine. If a significant number of irrigation customers move off of the grid, the utility is left maintaining the same distribution system with much less revenue; and in a rural area, it may be years before additional load moves in to replace the lost load.

TGFA supported the inclusion of irrigation in the definition and stated that it qualifies as seasonal agricultural load if it is for agricultural purposes.

Commission response

The commission agrees with all parties that irrigation should be included in the definition and, therefore, retains the inclusion. The commission agrees with Joint TDUs that irrigation must be specifically for the use of raising agricultural crops and amends the definition to include further clarification. The commission notes that in the phrase "producing and processing crops subsequent to their harvest," "subsequent to their harvest" directly refers to processing, not producing and, therefore, does not eliminate irrigation. However, the commission modifies this phrasing to eliminate confusion.

Question 4

Joint TDUs commented that the proposed definition does not readily lend itself to a narrow interpretation and that there is some probability that customers that should be included will be excluded and those that should be excluded will be included. Joint TDUs stated that the proposed definition sets the framework for excessive complaints from customers that believe they should qualify, or still qualify.

TCGA commented that all four customer groups that it proposed for inclusion should be included and that it was not aware of any other groups that should be included. It stated that Mr. Donald Moncreif of AEP originally identified the issue; and in his testimony in PUC Docket 22352, he noted the need for seasonal agricultural customers to be billed based on their monthly maximum kW, because of their highly seasonal usage pattern. TGCA stated that, to the best of their knowledge, Mr. Moncreif's testimony was the basis for this treatment and that he also determined that cotton gin and irrigation customers would be the two groups that would originally meet this definition. TCGA stated that it represents the cotton gin group of customers and that it provided testimony on the effect of the ratchet on the cotton gin class that resulted in the original definition of seasonal agricultural customer. In their original testimony, TCGA stated that it used test year data received from the utilities. Based on the projected costs at that time, TCGA stated that, without a ratchet provision, total wires charges would cost an average of $0.0371/kWh for WTU customers and $0.0274/kWh for CP&L customers; and the distribution only rate would cost $0.0289/kWh for WTU and $0.0133/kWh for CP&L. Using the same data and assumptions, the distribution only rates with the ratchet in place would cost the gin customers $0.0988/kWh for WTU and $0.0573/kWh for CP&L. Total wires costs with the ratchet were projected at $0.1081/kWh for WTU and $0.0716/kWh for CP&L. At that time, it was assumed that the transmission charges would not be ratcheted. TCGA stated that, if it were to substitute the actual distribution charges today, the ratcheted distribution-only charges would cost the cotton gin customers $0.1141/kWh for WTU and $0.0684/kWh for CP&L. TCGA stated that the need for seasonal agricultural treatment was well established for cotton gins during the original case and that it is apparent that costs have increased significantly since that time.

TGFA stated that "seasonal" and "agricultural" are two key words in the definition adopted by the commission in 2001. If the retail customer is engaged in agricultural activities that are performed during various times during the year, rather than year-round, the customer should be eligible for the exemption; and the rule needs to be flexible enough to allow for the different types of customers that fall within these parameters. TGFA stated that the proposed definition does not include customers that should be excluded and does not exclude customers that should be included. However, in comments on the definition itself, TGFA recommended that rice and grain storing be amended to include drying as well.

TXU Energy stated that the definition excludes certain segments of customers with similar seasonal load characteristics, such as ball-field lighting premises, from the same benefits offered to agricultural premises. TXU Energy stated that these premises do not qualify as seasonal agricultural customers under the current or proposed definition, and there is no seasonal definition for other seasonal usage customers in Chapter One of the Pro-Forma Retail Delivery Tariff. Therefore, a premise with similar usage characteristics is being treated differently solely on the basis of customer type rather than usage characteristics. TXU Energy stated that, for both customer types, any initial costs to the customer for service are derived from the particular TDSP's line extension policies and that, even though any applicable contribution in aid of construction is applied similarly to each customer type upon initiation of service, a seasonal agricultural customer receives preferential treatment in how the TDSP bills the customer's REP for demand. TXU Energy requested that ball-field lighting premises and other seasonal use customers that exhibit similar characteristics to that of seasonal agricultural customers be included in the definition, or that the designation be changed to seasonal use customer.

Joint TDUs responded that expanding the qualifying customer base to include non-agricultural "seasonal" use retail customers is beyond the scope and purpose of this project and, therefore, must be rejected. They also took exception to TXU Energy's statement that seasonal agricultural customers receive preferential treatment. Joint TDUs stated that each TDU's billing is based on their respective commission-approved tariffs and that the commission has broad discretion to ascertain when a rate is unduly preferential. Joint TDUs added that it is ironic that TXU Energy's recommendation would expand the granted preference which it implicitly criticized.

TGFA agreed that ball-field lighting premises share some of the seasonal characteristics of seasonal agricultural customers; however, the rule amendment is limited to alleviating the inconsistencies in the application of the commission order which

exempted seasonal agricultural customers. TGFA stated it would not oppose the addition of ball-field lighting customers if they could be added without another round of publication, notice, and comment, as well as without unreasonable delay. Otherwise, TGFA recommended that the commission initiate a new rulemaking for seasonal recreational customers at a later time.

Commission response

The decision to exempt seasonal agricultural customers from the demand ratchet provision was made during a contested proceeding in Docket Number 22344. The purpose of this proceeding is to clarify the customers to which that exemption applies. It is outside of the scope of this proceeding to expand the exemption to customers not contemplated in the contested proceeding. Therefore, the commission declines to amend the definition to include ball-field lighting as requested by TXU Energy in this proceeding. As previously indicated by the commission at the Open Meeting on June 22, 2007, the commission may address the broader issue of the application of demand ratchets to other customers in a separate proceeding.

The commission agrees with TCGA and TGFA that the applicable parties have been included in this definition, with the exception of rice and grain drying. The commission responds to the comments of the Joint TDUs in response to their more specific recommendation of a new definition in the section immediately below.

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Joint TDUs proposed an alternate definition, which they stated would provide a clearer understanding of the qualification requirements to ensure a consistent and uniform application of the 80% demand ratchet waiver for seasonal agricultural customers. Additionally, Joint TDUs stated that it would create a more clear understanding for customers and would require less administrative oversight once a customer meets the qualifications and is granted the waiver. The Joint TDUs' alternate definition was as follows:

RETAIL SEASONAL AGRICULTURAL CUSTOMER. Grain handling/storage customers, cotton gins, grain dryers, and irrigation customers whose electric load is primarily engaged in the production and processing of agricultural crops, including preparing or storing them for market, and whose electric load is subject to variations. In addition to the end-use criteria stated above, an account must have significant seasonal variation to qualify as a "Retail Seasonal Agricultural Customer". For purposes of this definition, significant seasonal variation means that the customer's maximum monthly demand (kW or kVA) in eight months of a calendar year must be at least 75% less than the annual high monthly demand for the same calendar year. To be qualified as an irrigation customer, the pumping load must be for water that is used to raise agricultural crops, and does not include turf farms, golf courses, or watering systems for ornamental plants.

In reply comments, TCGA stated that the Joint TDUs' proposed definition was generally acceptable to TCGA, with one exception. TCGA stated that, in their original comments, it discussed the potential problems that would result from the inclusion of a specific time limit on the number of months a seasonal customer could reach peak usage to be considered seasonal. TCGA stated that the definition proposed by the Joint TDUs would produce the problematic results discussed in TCGA's original comments.

In reply comments, TGFA stated that the Joint TDUs' proposal, with the limitations of a 75% demand variance and a four-month period for higher demand completely ignores the facts that crop production and, therefore, crop processing, does vary by type of crop and geographical location. TGFA stated that, to suggest that weather in Texas can be predicted is preposterous. Weather, type of crop, and growing seasons are all factors that customers deal with on an annual basis; and the limitations proposed by Joint TDUs would prevent many customers from obtaining the exemption which Order Number 40 in Docket 22344 (Order 40) authorized, without making such distinctions. TGFA commented that the Joint TDUs' proposed definition would increase administrative difficulties and customer confusion and would not eliminate the discriminatory situation that exists today. For example, if unexpected rain occurs, requiring the harvest to extend beyond the four-month period, there would be questions as to whether the customer would lose the exemption and when or if a customer that lost an exemption might regain the exemption. TGFA stated that it is not reasonable to leave such decisions to each TDU's selective tariff interpretation.

TGFA requested that the definition proposed by the commission include rice and grain drying in addition to storing rice and grain.

Commission response

The commission agrees with the Joint TDUs' recommendation in regards to referring to demand rather than consumption and adding specificity regarding irrigation. However, for the reasons pointed out by TCGA and TGFA, the commission disagrees that it is appropriate to specify the number of months of the year that the customer must be at a certain level of demand or the percentage below the peak demand that the customer must be at for those months.

The commission agrees with TGFA that it is appropriate to include rice and grain drying in addition to storing rice and grain and amends the definition accordingly.

General Comments

Joint TDUs stated that there appears to be a misconception that there is no cost impact resulting from a definition that is likely to grant additional exceptions from the charges related to the 80% ratchet requirements of the standard tariff schedules. The Joint TDUs commented that each TDU's cost of service tariff and resulting tariff schedule pricing is based on the revenue impacts associated with the respective TDU's current application of the retail seasonal agricultural customer exemption and that the adoption of a consistent application of the exemption will have fiscal impacts on both the TDUs and the newly affected customers. Some customers currently enjoying the discount afforded by the respective TDU's application of the exemption will lose that benefit while other customers that do not currently receive the discount will begin to receive it. Joint TDUs stated that the implementation of the proposed tariff provision that will allow some customers to bypass certain charges that have already been considered in a cost of service study will create a revenue shortfall in the TDU's next general rate case. Other customers will also be affected; and once consideration has been given in a TDU general rate case to the calculation of the pricing of the billing determinants for the affected rate classes, the revenue requirements avoided by the waiver to seasonal agricultural customers will be reallocated to other customers. Joint TDUs stated that careful consideration should be taken to ensure that the benefits granted by the new definition to a small subset of customers is considered fair and appropriate by those customers that will

be paying the additional revenue requirements. Therefore, the Joint TDUs recommended that any new definition of a "Retail Seasonal Agricultural Customer" be implemented at the time of each TDU's next general rate case so that the TDU can account for the change in billing determinants.

TGFA disagreed with the Joint TDUs' claims regarding cost and stated that the Staff is well aware of the potential cost of the rule amendment to the Joint TDUs and that, in Order 40 at 1 and 5, the commission concluded that a uniform customer classification scheme is appropriate for the purpose of standardizing transmission and distribution rates in Texas and in furtherance of the principles of cost causation, simplicity, and equity to customers within the given rate classes. TGFA stated that the inconsistent and random application of the exemption from the billing ratchet for retail seasonal agricultural customers has resulted in a failure by the TDUs to comply with the commission's order and forced customers to pay amounts in excess of what the commission intended. Additionally, in Order 40, the commission ordered the Joint TDUs to design their rates to reflect the exemption in the order.

In reply comments, joint TDUs added that all things being equal, implementing additional exemptions before a general rate case has the effect of diminishing the utility's ability to earn its allowed rate of return.

TGFA disagreed that the changes should not be made until each TDU's next rate case. TGFA stated that this is not a new issue, as it was discussed and decided seven years ago in Docket 22344. TGFA emphasized the following language, from page 8 of the order: "the design for each customer class that includes seasonal agricultural customers shall contain a provision for the recovery of distribution charges without the use of a demand ratchet for those customers." TGFA stated that this portion of the order required the rates to be designed to recover the cost shift from other customers within the classes where the agricultural customers were exempted and that the commission does not need to wait until each TDU's next rate case. TGFA claimed that retail seasonal agricultural customers have over-paid long enough, and the cost of denying this exemption has been unjustly borne by customers engaged in the agriculture industry for the past five years.

Commission response

The decision for a retail seasonal agricultural customer to receive an exemption to the demand ratchet was made in Docket Number 22344. The addition of a definition pursuant to this rulemaking does not change that decision. Instead, this rulemaking clarifies the decision by providing a definition of retail seasonal agricultural customer. Any effect on a TDU's overall rate of return that results from applying this definition should be small. In addition, a TDU has the right to seek a rate change if it is not earning a reasonable rate of return. Waiting until a TDU's next general rate case to implement the definition could mean that implementation of the definition is delayed for years, which would unacceptably frustrate the goal of this rulemaking to have TDUs apply a uniform definition. Consequently, each TDU shall file a compliance tariff incorporating the new language within 30 days of the effective date of this rulemaking amendment. Upon notification from a customer's REP that a customer's premise qualifies for the exemption, the TDU shall apply the exemption to the billings for the applicable premises and shall apply the exemption on a prospective basis as contemplated in Tariff Section 4.3.6. To the extent that a TDU is notified or discovers that a customer's premise is no longer eligible under the new definition, the TDU shall make any changes to that premises billing as contemplated in Tariff Section 4.3.6.

Joint TDUs also commented that "as evidenced by the four questions presented by Staff, the proposed definition might not meet the desired objectives of consistent and uniform application." TGFA responded that the Staff was asking questions to make sure that the definition meets the test of being fair and applicable between reasonable parties in most situations.

TCGA stated that the proposed published definition is reasonable as written. TCGA stated that the purpose of the original seasonal agricultural customer definition was to allow the seasonal agricultural customers to participate in the open market and that the original concern was, if wires rates were set at an excessive level, there would be no headroom for the customer to purchase energy. The existing definition has worked well for the cotton gin and irrigation customers, and removing either of these from the definition would have severe adverse effects to these customers. TCGA stated that rice and grain dryers do exhibit the same characteristics as the cotton gin and irrigation customer groups and, as such, should be added to the uniform definition.

Joint TDUs responded to TCGA and stated that they generally agreed with their general comments but that some of their comments in response to questions were too narrowly focused on the effect to cotton farmers. Joint TDUs agreed with TCGA that the original concern for the ratchet exemption was that, if wires rates were set at an excessive level, there would simply be no "headroom" for the REPs to purchase energy. Joint TDUs stated that any other interpretation and customer exemption without the showing of negative headroom and seasonal usage by an agricultural customer would have been outside of the scope of the original exemption from the distribution demand ratchet.

TGFA stated that it fully supported the commission's rule proposal and commented that it is necessitated by the inconsistencies that have arisen from the lack of a definition of a retail seasonal agricultural customer in the tariffs of the electric utilities in the Electric Reliability Council of Texas. TGFA stated that the definition is necessary to ensure the uniform application of the seasonal agricultural exemption from the 80% billing demand ratchet, which was ordered in the commission's final orders in the unbundling dockets that established the transmission and distribution rates and tariffs prior to market restructuring. TGFA provided language which it stated was from Order 40, which provided an explanation as to why the commission created the exemption for seasonal agricultural customers. TGFA stated that, while each of the TDU's tariffs contains provisions for the exception, without a definition in the generic tariffs and substantive rules, there is no consistency. The benefits to be gained by implementation would be the elimination of inconsistencies to ensure that all of the retail customers who have been eligible for this exemption since the commission's decision in 2001 will be able to take advantage of the exemption. TGFA claimed that the omission of a definition in the Pro-Forma Retail Delivery Tariff has led to discriminatory treatment of retail seasonal agricultural customers based simply on the location of their facilities and has resulted in some customers being charged amounts in excess of the authorized tariff for service and has failed to ensure uniform rates between TDUs in accordance with Order 40. TGFA stated that the cost of denying this exemption has been unjustly borne by customers engaged in the agriculture industry for the past seven years and that the cost to correct the omission is negligible to any party. TGFA also stated that the lack of uniformity has resulted in seasonal agricultural customers overpaying the distri-

bution charges authorized in the TDU's tariffs and paying higher rates in the competitive market than they would have paid under the pre-restructuring bundled rates or the Price-to-Beat.

Joint TDUs replied that it is incorrect to assume that any eligible customers have been denied the demand ratchet waiver and have been overbilled by TDUs since unbundling. Joint TDUs stated that all customers that have met the qualifications of each TDU's applicable, long-standing and consistent application of the waiver for seasonal agricultural customers have enjoyed that benefit. The possible adoption of a new state-wide definition to expand the set of customers eligible to receive this benefit in the future in no way implies that historical over-billing has occurred. Joint TDUs commented that new rules and new rates can only be applicable on a prospective basis. Joint TDUs also stated that, contrary to certain assertions, PURA never guaranteed that a seasonal agricultural customer, or any other retail customer, would receive a lower bill in the competitive market than in the bundled market other than the protection provided to Price-to-Beat customers.

Joint TDUs disagreed with TGFA's assertion that the commission intended that application of the exemption to be consistent across all TDUs and stated that this does not appear to be the intent since the commission did not establish a definition at the time. Instead, the determination was left to the TDUs and provided the opportunity for any interested party to demonstrate that it would be harmed without the exemption. Joint TDUs stated that TGFA has misinterpreted the criteria on which the commission based its original exemption from the ratchet as ensuring a guarantee that competitive total bills would be less than previous bundled bills and that, with the exception of the Price-to-Beat, no such guarantee was provided through Order 40. Joint TDUs stated that only TGFA has disputed the consistent application, based on its desire for all TDUs to apply the waiver identically.

Joint TDUs disagreed with TGFA's allegation that the TDUs have been engaged in discrimination on this matter. The future adoption of a definition that includes a larger sub-set of customers does not constitute discrimination in the past for those customers that are just now included in the new definition. Joint TDUs stated that, in the generic Unbundled Cost of Service (UCOS) case, the commission considered whether seasonal agricultural customers were entitled to an exemption from the ratchet; and the information for the exemption for other customer classes was to be provided in the individual UCOS compliance cases. In the generic UCOS case, TCGA provided examples of the negative headroom that would be experienced by cotton gin customers if the ratchet was applied. Negative headroom was considered a situation in which the transmission and distribution bill would be greater than the Price-to-Beat, which was considered to be a barrier to competition. Joint TDUs stated that, in the cases of TCC and TNC, the exemption was also based on the existence of a specific seasonal agricultural bundled rate and whether that customer class experienced negative headroom as calculated in the UCOS cases. For TCC and TNC, only cotton gin and irrigation retail customers met the exemption criteria.

Joint TDUs questioned TGFA's assertion that the cost to correct the omission is negligible to any party. Joint TDUs stated that, if the costs are negligible, then its membership is presumably not being burdened unreasonably. Joint TDUs claimed that it is cavalier for TGFA to argue for expansion of the exemption and concurrently assume that no one else will be adversely affected by having demand costs reallocated to the other customers in the same rate class.

Commission response

The general comments above have been considered in the commission's responses to each of the specific comments and the corresponding revisions to the rule.

All comments, including any not specifically referenced herein, were fully considered by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 (Vernon 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also adopts this rule pursuant to PURA §36.001, which grants the commission the authority to adopt rules for determining the classification of customers and the applicability of rates; PURA §39.203, which grants the commission the authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice; and PURA §32.101, which requires an electric utility to file a tariff with the commission.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 36.001, 39.203, and 32.101.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of retail delivery service, including delivery service to a Retail Customer at transmission voltage, provided by a transmission and distribution utility (TDU), and to standardize the terms of service among TDUs. A TDU shall provide retail delivery service in accordance with the terms and conditions set forth in this section to those Retail Customers participating in the pilot project pursuant to PURA §39.104 on and after June 1, 2001, and to all Retail Customers on and after January 1, 2002. By clearly stating these terms and conditions, this section seeks to facilitate competition in the sale of electricity to Retail Customers and to ensure reliability of the delivery systems, customer safeguards, and services.

(b) Application. This section, which includes the pro-forma tariff set forth in subsection (d) of this section, governs the terms and conditions of retail delivery service by all TDUs in Texas. The terms and conditions contained herein do not apply to the provision of transmission service by non-ERCOT utilities to retail customers.

(c) Tariff. Each TDU in Texas shall file with the commission a tariff to govern its retail delivery service using the pro-forma tariff in subsection (d) of this section. The provisions of this tariff are requirements that shall be complied with and offered to all REPs and Retail Customers unless otherwise specified. TDUs may add to or modify only Chapters 2 and 6 of the tariff, reflecting individual utility characteristics and rates, in accordance with commission rules and procedures to change a tariff; however the only modifications the TDU may make to 6.1.2.1 are to insert the commission-approved rates. Additionally, in Company specific discretionary service filings, Company shall propose timelines for discretionary services to the extent applicable and practical. Chapters 1, 3, 4, and 5 of the pro-forma tariff shall be used exactly as written. These chapters can be changed only through the rulemaking process. If any provision in Chapter 2 or 6 conflicts with another provision of Chapters 1, 3, 4, and 5, the provision found in Chapters 1, 3, 4, and 5 shall apply, unless otherwise specified in Chapters 1, 3, 4, and 5.

(d) Pro-forma Retail Delivery Tariff.

(1) Tariff for Retail Delivery Service.

Figure: 16 TAC §25.214(d)(1)

(2) Compliance tariff. Compliance tariffs pursuant to this section must be filed by February 15, 2008.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 4, 2008.

TRD-200800043
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Public Utility Commission of Texas
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Proposal publication date: October 19, 2007
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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new §25.455, relating to One-Time Bill Payment Assistance Program, with changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4699) and amendments to §25.497, relating to Critical Care Customers, with no changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4699). The commission also adopts a new form to accompany §25.455. The new form will not be published with the new rule. Conforming amendments to §25.451, relating to Administration of the System Benefit Fund; §25.454, relating to Rate Reduction Program; and §25.457, relating to Implementation of the System Benefit Fee by the Municipally Owned Utilities and Electric Cooperatives will be considered during a subsequent rulemaking relating to the low-income discount calculation. The adopted new rule and amendment define a one-time bill payment assistance program for an eligible residential customer who has been threatened with disconnection of electric service for non-payment and who is or has in his or her household a low-income person who is seriously ill or disabled and whose health or safety may be injured by the disconnection. The new rule is required by Public Utility Regulatory Act (PURA), §39.903(e)(1)(B) and (j-1), and is a competition rule subject to judicial review as specified in PURA, §39.001(e). The commission adopts this new rule and amendment under Project Number 33811.

The commission received written comments on the proposed new rule and rule amendment from Texas Legal Services Center and Texas Ratepayers' Organization to Save Energy (collectively "TLSC and Texas ROSE") and from CPL Retail Energy, Direct Energy, Green Mountain Energy Company, Liberty Power, Stream Energy, WTU Retail Energy, TXU Energy, Reliant Energy, the Alliance for Retail Markets (ARM), and the Texas Energy Association for Marketers (TEAM) (collectively "the REP Coalition"). The commission received written reply comments from TLSC, Texas ROSE, CPL Retail Energy, WTU Retail Energy, Direct Energy, TXU Energy, Reliant Energy, and Liberty Power (collectively "the Consumer/REP Coalition"); the Office of Public Utility Counsel (OPUC); and TEAM. The commission subsequently received proposed rule language to support the reply comments of the Consumer/REP Coalition.

Responses to the Preamble Questions

In addition to seeking comments on the proposed new rule and rule amendment, the commission posed two questions for comment:

1. One method by which the low-income discount administrator (LIDA) could notify retail electric providers (REPs) of applications for one-time bill payment assistance would be for the LIDA to post to a file transfer protocol (FTP) site lists of customers applying for assistance. REPs would then review the FTP site on a daily basis. Are there alternative methods by which the LIDA could notify REPs of applications for one-time bill payment assistance, to ensure that customers are not disconnected during the application process?

TLSC and Texas ROSE proposed that this one-time bill payment assistance program be administered by REPs and local assistance agencies, which would obviate the need for such communication between REPs and the commission's contracted LIDA. According to TLSC and Texas ROSE, this would allow REPs to leverage existing communication channels and would reduce the cost of administering this program.

The REP Coalition proposed changes to the new rule that would obviate the need for the LIDA to notify REPs of applications for one-time bill payment assistance by having REPs (rather than the LIDA) receive proof of health status from the customer.

Commission response

The commission has addressed these proposals from TLSC and Texas ROSE and the REP Coalition in the General Comments section of this order.

2. How many customers do you expect would obtain assistance through this one-time bill payment assistance program each year? What do you expect the average assistance amount would be per customer, keeping in mind the limits provided by new P.U.C. Substantive Rule §25.455(d)(2)?

In response to Question #2, TLSC and Texas ROSE stated that, in the absence of more sophisticated industry-supplied estimates, the number of critical care customers receiving disconnect notices, along with poverty rates, could be used to estimate the number of customers that could be expected to apply for one-time bill payment assistance in a given year. Based on its analysis of Commission Staff's Disconnect for Non-Pay Report for April 2006 through May 2007 (PUC Project No. 29760, *Compliance Filings Relating to Disconnection of Electric Service Pursuant to PUC Subst. R. 25.483(b)(2)(C))*, TLSC and Texas ROSE estimated that approximately 930 customers per year might apply for assistance through this program. TLSC and Texas ROSE asserted that it has no basis for estimating the average amount of assistance that would be required per customer.

The REP Coalition stated that insufficient information is available at this time to predict the number of customers who would obtain assistance through this program. However, the REP Coalition believes the number to be less than 10,000.

Commission response

The commission has taken TLSC and Texas ROSE's and the REP Coalition's comments regarding Staff's second preliminary question into account in its consideration of this rule.

General Comments

TLSC and Texas ROSE proposed that this one-time bill payment assistance program be administered by REPs and local assistance agencies, rather than by REPs and the LIDA. According to TLSC and Texas ROSE, these agencies: already have experience administering similar programs, already have procedures in place to prevent disconnection while customer applications are being processed, may already serve the customers intended to benefit from this program, routinely serve customers who have been referred to them by REPs, and are already authorized to receive customer information for their clients directly from REPs. The Consumer/REP Coalition supported this proposal in its reply comments, because it would provide multiple channels by which eligible customers could obtain assistance through this program. Furthermore, the Consumer/REP Coalition asserted that this approach would minimize the cost of administering the program, because it would leverage existing channels of communication between REPs and local agencies, would utilize REP and local assistance agency staff already involved in the operation of energy assistance programs, and could eliminate the necessity for the LIDA to play a role in qualifying eligible customers. The Consumer/REP Coalition supported the use of the existing LITE-UP reimbursement process to reimburse REPs for one-time bill payment assistance provided to eligible customers.

Commission response

The commission agrees that local assistance agencies can aid customers in applying for assistance through this program and encourages REPs to work with the agencies to provide an additional point of access to this program. The commission envisions the agencies bringing this program to the attention of customers who may be eligible, helping those customers submit the appropriate proof of health status to REPs (to satisfy the seriously ill or disabled portion of the program eligibility requirements) and helping those customers submit the appropriate proof of income status to the LIDA (if necessary to satisfy the low-income portion of the program eligibility requirements). However, the commission does not find it appropriate to allow parties other than the commission's contracted LIDA to determine a customer's income eligibility for this program and thus believes the ill or disabled household member's income status and corresponding eligibility must ultimately be determined by the LIDA. This approach is consistent with the determination of eligibility for the existing rate reduction program and provides greater certainty that eligibility determinations will be made correctly and documented appropriately. The commission believes the relationship between REPs and the local assistance agencies, for the purpose of this program, is most appropriately handled by REPs themselves, rather than through this rule. Therefore, the commission has declined to include language pertaining to the agencies in new §25.455.

The Consumer/REP Coalition proposed that the commission allocate a portion of the appropriated program funds to each REP, based on the number of low-income customers served by each REP. Under this proposal, funds would not be disbursed to REPs until after credits are provided to eligible customers. An REP would be allowed to provide assistance through this program in an amount up to its allocated allowance of the appropriated funds. An REP could allocate all or part of its allowance to local assistance agencies. The commission could update REPs' fund allocations every six months to account for changes in the numbers of low-income customers served by each REP. The Consumer/REP Coalition believes this allocation methodology would allow REPs to better manage program funds and would eliminate the potential for a situation in which an REP provides a bill credit to an eligible customer without realizing that appropriated program funds may have already been exhausted.

Commission response

The commission agrees that funds appropriated for this program should be allocated among REPs based on each REP's share of the total number of low-income customers. However, the commission wishes to reduce the possibility of situations in which an eligible customer is denied assistance by his or her REP because that REP has exhausted its own allocated program funds, even though funds are still available from other REPs who have not yet exhausted their allocated program funds. Therefore, the commission has amended the Consumer/REP Coalition's proposal to retain 20% of authorized program funds for eligible customers of REPs that: (a) have exhausted their allocated funds, or (b) were not allocated funds (*e.g.*, REPs who initiate retail electric service to residential customers after allocations are determined). Thus, 20% of the available funds would not be allocated to REPs but would be reserved to be used as needed, to ensure that customer needs are met as equitably as possible. The commission would also allocate available funds at six-month intervals. Allocation at six-month intervals will better reflect different demands on the fund by the customers of different REPs, based on customers transferring from one REP to another, or other factors. As discussed above, the commission believes the relationship between REPs and the local assistance agencies, for the purpose of this program, is most appropriately handled by REPs themselves, rather than through this rule. Therefore, the commission has declined to include language pertaining to the agencies in new §25.455.

The REP Coalition proposed that this new rule leverage existing REP processes that are used to qualify eligible customers for the 63-day protection against disconnection afforded by §25.483(g), relating to Disconnection of Service, and allow REPs, rather than the LIDA, to determine whether a customer is seriously ill or disabled for the purpose of this program. A customer would thus be able to, at the same time, establish eligibility both for the 63-day protection against disconnection and for the health status portion of this one-time bill payment assistance program. According to the REP Coalition, the REP could then counsel the customer to apply for one-time bill payment assistance, if the ill or disabled household member meets the low-income requirement. This approach would limit the LIDA's responsibilities to the determination of income status, would reduce the amount of communication required between the LIDA and REPs, and would automatically provide eligible customers with the benefit of 63-day protection against disconnection for non-payment. The REP Coalition also argued that this approach would be beneficial in that it would limit the length of time in which it is to be determined whether a customer qualifies for one-time bill payment assistance. The REP Coalition supported the use of the LIDA to determine eligibility for the low-income portion of the program requirements.

Commission response

The commission agrees with the REP Coalition's approach, and has made most of the REP Coalition's suggested changes and deletions in several subsections of §25.455. The commission has made other changes to ensure the entire rule conforms to this approach. The commission believes this approach will reduce the amount of communication required between the LIDA and REPs and will avoid the duplication of processes already in place to administer §25.483(g). This approach will also allow REPs to determine program eligibility when the customer is ill or disabled and the customer is already receiving the LITE-UP dis-

count, because the customer, in such a situation, has previously been qualified as a low-income person by the LIDA.

However, the commission disagrees that this program's seriously ill or disabled eligibility criteria should rely completely on the language in §25.483(g). The REP Coalition proposed that a customer demonstrate compliance with the seriously ill or disabled eligibility requirement by establishing "that disconnection of service will cause some person residing at the residence to become seriously ill or more seriously ill pursuant to §25.483(g) of this title." The commission believes the "seriously ill or more seriously ill" criterion of §25.483(g) may be less inclusive than the criteria of PURA §39.903(j-1), which requires that this program be available to a customer who "is or has in the customer's household one or more seriously ill or disabled low-income persons whose health or safety may be injured by the disconnection." The commission has, therefore, adjusted the Consumer/REP Coalition's proposed language. The commission's substitute language appears in §25.455(d)(1)(B) and (f)(2)(A), but still allows REPs to determine whether a customer is seriously ill or disabled for the purpose of this program.

The Consumer/REP Coalition proposed that REPs be able to automatically determine customer eligibility using the LITE-UP Texas eligibility list and the documentation in the REP's records of critical care status. OPUC supported these suggestions in its reply comments.

Commission response

The commission agrees that, if it is the customer who is ill or disabled (rather than a member of the customer's household) and the customer is already on the LITE-UP Texas eligibility list, then the REP can consider that customer to have satisfied the low-income requirement of this program. The commission has addressed the critical care recommendation elsewhere in this order.

§25.455(a)

The REP Coalition proposed that "for nonpayment" be inserted into §25.455(a), to clarify that this program is limited to customers who are threatened with disconnection for non-payment, rather than for other reasons, such as theft of service or unsafe facilities.

TLSC and Texas ROSE proposed to add additional language to §25.455(a), to expand the purpose of the new rule to include: providing an alternative to using disconnection as a collection tool for customers who are unable to increase their income because they are seriously ill or disabled and may be dependent on medical equipment for life support and to assure that seriously ill and disabled customers have an uninterrupted supply of electricity.

Commission response

The commission agrees with the REP Coalition's proposal, and has made the recommended addition.

The commission disagrees with TLSC and Texas ROSE's proposal. The purpose of this program, as stated in PURA, is to provide one-time bill payment assistance to eligible electric customers who have been threatened with disconnection for nonpayment and who are or who have in their households one or more seriously ill or disabled low-income persons whose health or safety may be injured by disconnection of electric service. The purpose of this program is not to guarantee an uninterrupted supply of electricity.

§25.455(c)

The REP Coalition proposed that changes be made to §25.455(c), to automatically suspend certain requirements of §25.455 if the one-time bill payment assistance program is not funded.

Commission response

The commission agrees and has made the recommended changes, except that it has retained the exception in subsection (c)(2)(A), which requires REPs to maintain a record of customers who have used the program in the current fiscal year, in the event that funding is restored later in a year.

§25.455(d)

The REP Coalition proposed three clarifying changes to §25.455(d). First, the REP Coalition proposed that "shall be" be changed to "is." This change would clarify that assistance through this program is available, but would avoid requiring that REPs actively seek out all eligible customers. Second, the REP Coalition proposed that references to the notice requirements in §25.483 and §25.480, relating to Bill Payment and Adjustments, be deleted, to eliminate any ambiguity as to whether the one-time bill payment assistance program must be specifically mentioned in the disconnection notice. Third, the REP Coalition proposed to add a new subsection to §25.455(d), to clarify that REPs are entitled to reimbursement for one-time bill payment assistance they provide to eligible customers. This is consistent with §25.454(e)(3)(D), relating to Rate Reduction Program, which states that REPs are entitled to reimbursement for the low-income discounts they provide to eligible customers. The REP Coalition also recommended that the commission revise §25.451(j), relating to Reimbursement for Rate Reductions, so that it addresses reporting and reimbursement for both the LITE-UP and one-time bill payment assistance programs.

TLSC and Texas ROSE proposed that a person who has been determined to be disabled for the purpose of Supplemental Security Income (SSI) automatically meet the health status portion of the one-time bill payment assistance program's eligibility criteria. TLSC and Texas ROSE raised concerns that some disabled persons may face difficulty in getting to the physician and that Medicaid may not cover a visit to a physician for the purpose of establishing eligibility for this program.

TLSC and Texas ROSE would change §25.455(d) to allow critical care status to automatically qualify a customer for the seriously ill and disabled portion of this program's eligibility requirements. TLSC and Texas ROSE stated that a critical care customer is seriously ill or disabled and should not have to further verify information, because the customer's REP already knows the customer's critical care status. The Consumer/REP Coalition supported this suggestion in its reply comments, as did OPUC.

Commission response

The commission agrees that, while REPs are obligated by rule to inform their customers of available bill payment assistance options, this program should be driven by customers seeking assistance. Therefore, the commission has made the first recommended change. The commission also agrees with the REP Coalition regarding the references to notice requirements and so has made the recommended deletions. The commission agrees with the REP Coalition's suggestion to add a new subsection to §25.455(d) and has made the recommended addition. The commission plans to make conforming amendments to §25.451 in a subsequent rulemaking.

The commission disagrees that a person who has been determined to be disabled for the purpose of SSI should automatically meet the health status portion of the one-time bill payment assistance program's eligibility criteria. There is no way to verify, without a physician's statement, that a person who meets the SSI disability criteria could have their health or safety injured by the disconnection of electric power, as required by PURA §39.903(j-1). TLSC suggested that, if a physician's statement is required of such a person, the person be allowed to use the same physician's statement more than once when applying for this program. Because of the mobility and cost concerns expressed by TLSC and Texas ROSE, the commission agrees that a person who meets the SSI disability criteria and has obtained a physician's statement for the purpose of this program, may re-submit a copy of that same physician's statement in a limited number of future applications for this assistance, as long as the person continues to meet the requirements of SSI disability and proves that status to his or her REP. The commission has added this new provision as §25.455(d)(4).

The commission does not believe that the critical care designation should automatically qualify a customer for the seriously ill and disabled portion of this program's eligibility requirements. Section 25.497, relating to Critical Care Customers, has never provided critical care residential customers with financial assistance or protection from disconnection for non-payment and, in fact, requires critical care residential customers to satisfy the requirements of §25.483(g) to qualify for the protection against disconnection afforded by that subsection. Because a critical care customer must have a physician provide medical information to meet the requirements of §25.483(g) to qualify for the 63-day protection against disconnection for non-payment, the effort required of the customer to satisfy that existing requirement will, at the same time, satisfy the seriously ill and disabled portion of this program's eligibility requirements, if the medical condition meets the criteria for assistance under this section.

§25.455(d)(1)(C)

TLSC and Texas ROSE proposed to change §25.455(d)(1)(C), to delete the reference to the low-income customer definition in §25.5, and define the term explicitly as, "An electric customer, whose household income is not more than 125% of the federal poverty guidelines, or who receives food stamps from the Texas Department of Human Services (TDHS) or medical assistance from a state agency administering a part of the medical assistance program."

Commission response

The commission disagrees that the link to the definition of low-income customer in §25.5 should be deleted. This link will allow §25.455 to remain consistent with the definition, should the definition change in the future.

§25.455(d)(2)

TLSC and Texas ROSE proposed to change §25.455(d)(2), to allow certain customers to exceed the annual cap on assistance per customer. These exceptions would be made for: (1) persons who have been discharged within 30 days from a hospital or other inpatient care facility, and (2) persons who submit certification that they are currently being treated for a terminal illness.

TLSC and Texas ROSE recommended tying the cap in §25.455(d)(2) to the maximum LIHEAP allowance (which is currently $1,200) because the LIHEAP benefits are reviewed regularly and the one-time bill payment assistance benefit could then increase independently of the need for study by the commission.

The Consumer/REP Coalition proposed that the cap be applied to the state fiscal year, rather than on a calendar year basis, so that it would coincide with appropriations for this program, which are granted on a fiscal year basis.

The REP Coalition proposed that §25.455(d)(2) be changed to clarify that a rulemaking would not be required for the commission to adjust the cap on assistance available per customer.

OPUC proposed that the cap in §25.455(d)(2) be a floating cap, to take into account the seasonal nature of electric bills (*i.e.*, Texas residential customers generally use more electricity during the summer months) and increases in the cost of natural gas (which impacts the price of electricity).

Commission response

The commission is sympathetic to the needs of persons in the situations described by TLSC and Texas ROSE. However, the commission disagrees that it can provide more benefits to one group of seriously ill persons than to another through this program.

The commission disagrees that the annual assistance cap for this program should be tied to the LIHEAP allowance. The commission should retain the ability to adjust this program's cap in light of the amount of funds available for the program and improvements over time in the ability to estimate the number of customers who may seek this assistance. The commission agrees that the cap should be applied on a fiscal year, rather than a calendar year, basis, and has made the appropriate changes.

The commission agrees that a change to the cap by the commission should not require a rulemaking. The commission has made the recommended change, except that it has retained the ability to adjust both restrictions that make up the cap, rather than just the dollar amount limit. The commission disagrees that the cap should automatically account for seasonality or natural gas prices. The commission has included significant flexibility in the amount of the cap, by allowing for adjustments to it.

§25.455(d)(3)

TLSC and Texas ROSE proposed that the term "one-time" in PURA §39.903(e)(1)(B) should not restrict the provision of assistance through this program to one time per customer per year, as in §25.455(d)(3). Rather, "one-time" should mean that assistance through this program is available to an eligible customer each time that customer is threatened with disconnection for non-payment, so long as the aggregate amount of assistance received by that customer does not exceed the annual cap. TLSC and Texas ROSE submitted that the "one-time" language is meant to distinguish this program from the LITE-UP Texas program, in which customers receive *ongoing* assistance each and every month. Unlike the LITE-UP Texas program, this bill payment assistance program, restricted by the "one-time" language, would only be available one time per disconnection notice received. The Consumer/REP Coalition supported this proposal.

Commission response

The commission disagrees that an eligible customer should be able to receive assistance through this program more than one time per year. While it is true the statute does not specifically define "one-time," to allow an eligible customer to access the program each time he or she is threatened with disconnection for non-payment would render the limitation essentially mean-

ingless. The commission believes assistance through this program is meant to be available to eligible customers during times of acute financial hardship. Using TLSC and Texas ROSE's definition of "one-time" would allow a customer to rely on assistance through this program on a regular basis, as often as every month, rather than during specific times of hardship. Furthermore, allowing customers to access assistance through this program more than once per year, up to a dollar cap, would exhaust funding more quickly and could lead to a lack of available funds for eligible customers who seek assistance later in the year. The commission believes this program should be available to assist as many eligible customers as possible, and so should be limited in the number of times a customer may access it in a single year.

§25.455(f)

The REP Coalition and the Consumer/REP Coalition proposed changes to the Responsibilities subsection of §25.455. These changes would conform §25.455(f) to their suggestions to allocate appropriated program funds to REPs; include local assistance agencies in the rule language; and allow for the determination of seriously ill or disabled status by REPs, rather than by the LIDA.

Commission response

As discussed elsewhere in this order, the commission agrees that REPs should determine seriously ill or disabled status and that the commission should allocate program funds among REPs, but disagrees that the local assistance agencies should be specifically assigned a role in this rule. The commission has amended this subsection accordingly. The commission has also amended this subsection to ensure that no REP provides assistance to an eligible customer, only to be informed during the reimbursement process that program funds have already been exhausted. This concern had been articulated by REPs as one of the reasons to allocate 100% of the program funds among the REPs, as opposed to 80% as decided upon by the commission.

§25.455(g)

The REP Coalition proposed to remove the Appeals Process subsection, as it does not believe a separate appeals process is necessary for this program. The REP Coalition suggested that, if the commission adopts the REP Coalition's proposal to allow REPs to determine whether a customer meets the seriously ill and disabled portion of this program's eligibility requirements, then there will be no need for a new appeals process. The REP Coalition stated that the determination by the LIDA as to a customer's income status already has an appeals process, in §25.454(f)(6). The REP Coalition stated a customer could appeal the determination as to health status through the REP, pursuant to §25.485(d), relating to Customer Access and Complaint Handling and then, if necessary, through the Commission's informal complaint process. The REP Coalition expressed the view that a customer could complete all available appeals processes during the 63-day disconnection deferral period afforded by §25.483(g).

OPUC proposed that customers be allowed ten business days, instead of five, to make appeals requests under §25.455(g).

Commission response

The commission believes this one-time bill payment assistance program does require appeals provisions in addition to those already in place in existing rules. For example, the appeals process in §25.454(f)(6) is specific to the rate reduction program and so does not contemplate protection against disconnection during the LIDA's review. Therefore, the commission has included in §25.455 a review of the LIDA's income status determination, while also protecting the customer from disconnection during that review process. Because the 63-day disconnection deferral period afforded by §25.483(g) begins on the date the bill is issued, the commission is skeptical that all appeals could be completed during the 63-day period, and has thus included protection against disconnection during an appeal.

However, changes to the Appeals Process subsection are needed as a result of the commission's acceptance of the REP Coalition's proposal that REPs, rather than the LIDA, be responsible for determining whether the customer meets the seriously ill or disabled eligibility requirement. The commission agrees that the existing appeals provisions of §25.485 would provide a customer with the necessary recourse, in the event that he or she is dissatisfied with the REP's determination as to health status eligibility. The commission has included a provision to protect the customer from disconnection during an REP's review and supervisory review.

The commission understands the REP Coalition's concern that the Proposal for Publication's appeals process could go on indefinitely, and so has made changes to address this issue.

Regarding OPUC's proposal, the commission has increased to eight calendar days the number of days in which a customer may appeal. The commission has also provided the customer protection against disconnection during the REP review process and while the customer submits additional proof of eligibility to the LIDA.

§25.483(g)

TLSC and Texas ROSE suggested that, in addition to adopting this one-time bill payment assistance program, the commission consider amending §25.483(g) to completely prohibit the disconnection of low-income seriously ill and disabled customers.

Commission response

The commission believes that the amendments to PURA relating to the one-time bill payment assistance program were adopted in recognition that electric service providers use disconnection as a means of collecting unpaid bills. Nothing in PURA prescribes an additional protection against disconnection that is as broad as the TLSC and Texas ROSE proposal. Accordingly, the commission does not adopt their proposal.

§25.497

OPUC expressed concern that seriously ill, disabled, and critical care customers' eligibility for deferred payment plans is restricted by the provisions of §25.480(j)(3). OPUC proposed that changes be made to prevent this and to require that REPs provide a longer repayment period for these customers.

Commission response

The commission notes that the protections afforded ill and disabled customers under §25.483(g) already require a REP to allow such a customer to enter into a deferred payment plan, notwithstanding the provisions of §25.480(j)(3). A change to extend the repayment period for ill and disabled customers is outside the scope of this rulemaking.

Application Form for One-Time Bill Payment Assistance Program

TLSC and Texas ROSE proposed that the application form for this program be created outside of this rulemaking proceeding, after the final rule is adopted. The Consumer/REP Coalition supported this proposal.

The REP Coalition proposed the standardization of a form for customers to receive benefits as a seriously ill or disabled person. This would allow the standardization of the format by which physicians submit that a customer (or household member) is seriously ill or disabled and qualifies for protection under §25.483(g).

The REP Coalition suggested that, because the income requirements for the one-time bill payment assistance program will mirror those of the LITE-UP program, it may be possible to add a box on the existing LITE-UP form simply asking if the person applying for low-income status is the electric customer or a member of the household.

Commission response

The commission disagrees with the proposal to create the form outside this rulemaking proceeding. The form reflects the provisions of new §25.455 and is approved with the new rule. However, because the LIDA will not be reviewing the health status portion of the customer's application, as had been contemplated in the Proposal for Publication, the commission is at this time only approving a form related to the seriously ill or disabled household member's health status. As for a form related to the income status of the seriously ill or disabled household member, the commission believes this may be accomplished with changes to the existing LITE-UP form, as the REP Coalition suggested, and will address any such changes in the future. The commission has made changes to §25.455 to conform the rule to this approach.

Regarding the REP Coalition's first suggestion, the commission has not proposed changes to §25.483 in this rulemaking proceeding, and so cannot mandate a form for use in the determination of eligibility for §25.483(g). However, the commission agrees that a form used to determine health status for the purpose of this one-time bill payment assistance program could also be used in determining health status for the purpose of §25.483(g) and encourages REPs to use this form when qualifying customers under §25.483(g).

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting §25.455, the commission makes other minor modifications for the purpose of clarifying its intent.

SUBCHAPTER Q. SYSTEM BENEFIT FUND

16 TAC §25.455

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 and §39.903(j-1) (Vernon 2007) (PURA). PURA §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its power and jurisdiction. PURA §39.903(j-1) requires the commission to adopt rules governing the one-time bill payment assistance program provided by PURA §39.903(e)(1)(B).

Cross Reference to Statutes: PURA §14.002 and §39.903(j-1).

§25.455. One-Time Bill Payment Assistance Program.

(a) Purpose. The purpose of this section is to define and implement a one-time bill payment assistance program for an eligible customer who has been threatened with disconnection for nonpayment of electric service and who is or has in his or her household one or more seriously ill or disabled low-income persons whose health or safety may be injured by the disconnection.

(b) Application. This section applies to retail electric providers (REPs) that provide electric service in an area that has customer choice, or an area for which the commission has issued an order applying the system benefit fund or one-time bill payment assistance. This section also applies to municipally owned electric utilities (MOUs) and electric cooperatives (Coops) on a date determined by the commission, but no sooner than six months preceding the date on which an MOU or a Coop implements customer choice in its certificated area unless otherwise governed by §25.457 of this title (relating to Implementation of the System Benefit Fee by Municipally Owned Utilities and Electric Cooperatives).

(c) Funding. The one-time bill payment assistance requirements set forth by this section are subject to sufficient funding and authorization to expend funds.

(1) Authorized program funds shall be allocated by the commission semi-annually, as follows:

(A) Forty percent of the program funds authorized for a state fiscal year shall be allocated to REPs not later than September, for use from September through February. Another 40% of the program funds authorized for a state fiscal year shall be allocated to REPs not later than March, for use from March through August. These allocations to REPs shall be based on the ratio of: the number of low-income customers served by the REP in the prior July or January to the total number of low-income customers served by all REPs in the prior July or January. The number of low-income customers served shall be based on actual rate reductions provided pursuant to §25.454 of this title (relating to the Rate Reduction Program). Funds shall not be allocated to a REP that would have an allocation of less than $1,000 under the ratio prescribed in this subparagraph. Such funds shall instead be added to the amount available pursuant to subparagraph (B) of this paragraph.

(B) Ten percent of the program funds authorized for a state fiscal year shall be available during the period September through February. Another 10% of the program funds authorized for a state fiscal year shall be available during the period March through August. Such funds shall be available to eligible customers of REPs who have exhausted their pro rata share of the authorized program funds for that same six-month period, and to eligible customers of REPs who were not allocated a share of the authorized program funds for that same six-month period.

(C) A REP shall not retain access to funds allocated to it based on subparagraph (A) of this paragraph beyond the six-month period for which those funds were allocated. After each six-month period has ended, the commission may re-allocate any unused funds from subparagraphs (A)and (B) of this paragraph. The commission may do so based on the methodology described in subparagraphs (A) and (B) of this paragraph, so long as the unused funds remain authorized for this program.

(D) An allocation of funds under this paragraph is not a payment to a REP. Funds will be paid to a REP as a reimbursement of benefits provided to customers, based on a REP's report to the commission in accordance with §25.451(j) of this title (relating to Administration of the System Benefit Fund).

(E) Commission staff administering this program may make the allocations under this section without commission action, and may notify REPs of their fund allocation.

(2) In the event that funding and authorization to expend funds are not sufficient to administer the program and fund assistance for customers, the following shall apply:

(A) The requirements of subsections (d) and (e), with the exception of subsection (d)(3), of this section are suspended until sufficient funding and spending authority are available.

(B) The requirements of the following provisions of this title, insofar as they relate to the one-time bill payment assistance program, are suspended until sufficient funding and spending authority are available:

(i) §25.451(j) of this title;

(ii) §25.457(j) of this title; and

(iii) §25.43(d)(3)(D) of this title (relating to Provider of Last Resort).

(d) One-time bill payment assistance program. Bill payment assistance under this section is available to an eligible customer one time per state fiscal year. REPs shall make this bill payment assistance program available to eligible customers, and shall provide credits to customers, consistent with subsection (f)(2)(F) of this section, to the extent that program funds are available to that REP.

(1) A customer shall be eligible for assistance through the one-time bill payment assistance program if the customer meets all of the following criteria:

(A) The customer is a residential electric customer and has received a notice from the customer's REP that electric service will be disconnected for nonpayment;

(B) The customer is or has in the customer's household a seriously ill or disabled person whose health or safety may be injured by the disconnection of electric service. The customer shall prove satisfaction of this criterion pursuant to §25.483(g)(1) of this title (relating to Disconnection of Service), except that the physician's written statement shall be submitted on a form approved by the commission for the purpose of this program. A REP shall afford a customer the protection provided by §25.483(g) of this title when that customer has fulfilled the requirements of this subparagraph. If the seriously ill or disabled person is not the customer, the customer shall attest that the seriously ill or disabled person resides in the household;

(C) The seriously ill or disabled person in the household meets the low-income parameters in the definition of low-income customer in §25.5 of this title (relating to Definitions), as determined pursuant to subsection (e) of this section; and

(D) The customer has not already received assistance under this section during the current state fiscal year (September through August).

(2) The commission may adjust the limit on the amount of assistance a customer may receive under this section in a single instance of assistance. Initially, the maximum amount of assistance a customer may receive under this section in a single instance of assistance is set at the lesser of $1,000 or the outstanding balance from the last three monthly bills for electric service.

(3) A customer may receive assistance under this section one time per state fiscal year, regardless of how many seriously ill or disabled low-income persons reside in the household. A REP shall inform a customer seeking assistance of this provision, shall maintain a record of its electric customers who have received assistance under this section in the current state fiscal year, and shall not approve assistance for electric customers to whom the REP has already provided assistance under this section in the current state fiscal year. For the purpose of determining whether a customer has already received assistance in the current state fiscal year, the stated date of disconnection in the disconnection notice used by the customer to apply for assistance shall be considered to be the date of assistance. A seriously ill or disabled low-income person may be the subject of only one application for this one-time bill payment assistance program in any one state fiscal year. The commission may audit applications for this program, and limit or prohibit further assistance under this section to any person found to have violated this section or to have provided a false statement to obtain assistance under this section.

(4) If the seriously ill or disabled person has been deemed disabled for the purpose of Supplemental Security Income (SSI), and has obtained a physician's statement on the commission-approved form to satisfy the requirements of subsection (d)(1)(B) of this section, that person may re-submit a copy of that same physician's statement to satisfy the requirements of subsection (d)(1)(B) of this section for up to three years from the time the statement is signed by the physician. The seriously ill or disabled person must be considered to be disabled for the purpose of SSI at the time the statement is signed by the physician, and at the time that same physician's statement is used again for the purpose of this one-time bill payment assistance program. The seriously ill or disabled person must provide current proof of SSI disability when re-submitting a copy of a previous physician's statement for the purpose of this program. A seriously ill or disabled person may only re-submit a copy of a previous physician's statement for the purpose of this program, and may not satisfy the requirements of §25.483(g) of this title in this manner.

(5) A REP is entitled to reimbursement under §25.451(j) of this title for one-time bill payment assistance provided to an eligible customer in accordance with this section.

(e) Establishment of low-income status.

(1) If the seriously ill or disabled person is the customer, the low-income requirement of subsection (d)(1)(C) of this section shall be satisfied in either of the following ways:

(A) The customer is enrolled in the rate reduction program described in §25.454 of this title; or

(B) If the customer is not enrolled in the rate reduction program, the customer may complete the appropriate commission-approved form, attesting to and providing proof of level of household income or of enrollment in an applicable Texas Health and Human Services Commission (HHSC) program, and the Low-Income Discount Administrator (LIDA) determines that the customer qualifies as a low-income customer under §25.454 of this title.

(2) If the seriously ill or disabled person is a household member other than the customer, the low-income requirement of subsection (d)(1)(C) of this section shall be satisfied if the customer or the seriously ill or disabled person completes the appropriate commission-approved form, attesting to and providing proof of level of household income or of the seriously ill or disabled person's enrollment in an applicable HHSC program, and LIDA determines that the seriously ill or disabled person qualifies as a low-income person.

(3) LIDA shall determine whether the seriously ill or disabled person is low-income by reviewing the completed commission-approved form. A seriously ill or disabled person who is not enrolled in the rate reduction program shall submit with the appropriate commission-approved form proof of enrollment in an applicable HHSC program, or proof of income in the form of copies of tax returns, pay stubs, letters from employers, or other pertinent information, consistent with §25.454 of this title. LIDA shall audit statistically valid samples of such enrollments for accuracy.

(f) Responsibilities. In addition to the requirements established in this section, program responsibilities for LIDA may be established in the commission's contract with LIDA; and program

responsibilities for tasks undertaken by HHSC may be established in the memorandum of understanding between the commission and HHSC.

(1) LIDA shall administer the process of self-enrollment for the purpose of determining income eligibility for the one-time bill payment assistance program. LIDA's responsibilities include:

(A) Distributing and processing low-income self-enrollment applications, as developed by the commission, for the purpose of applying for one-time bill payment assistance;

(B) Maintaining records for all applicants;

(C) Determining in a timely manner whether the customer is eligible for assistance in accordance with subsections (d)(1)(C) and (e) of this section. If, in the course of determining eligibility for one-time bill payment assistance, LIDA determines the customer is eligible for the rate reduction program under §25.454 of this title, LIDA shall also treat the application for one-time bill payment assistance as a self-enrollment application for the rate reduction program; and

(D) Notifying the REP and customer whether the customer has met the low-income requirements of this section. If the customer is notified that he or she has not met the low-income requirements of this section, LIDA shall inform the customer of the appeals process available under subsection (g) of this section.

(2) The REP's responsibilities shall include:

(A) Directing the customer how to establish, pursuant to subsection (d)(1)(B) of this section, that the customer is or has in the customer's household a seriously ill or disabled person whose health or safety may be injured by the disconnection of electric service, and determining whether the customer has met the requirements of subsection (d)(1)(B) of this section;

(B) Postponing disconnection activity in accordance with subsection (d)(1)(B) of this section;

(C) Directing the customer to contact LIDA directly, when necessary to establish low-income status of the seriously ill or disabled household member;

(D) Communicating with LIDA to ascertain the eligibility status of each customer for whom LIDA must determine income eligibility;

(E) Assisting LIDA in working to resolve issues concerning eligibility. This obligation requires the REP to employ best efforts to avoid and resolve issues, including training call center personnel on general assistance processes and information, and assigning problem resolution staff to work with LIDA on problems that LIDA does not have sufficient information to resolve. This obligation also requires the REP to provide available customer information to LIDA upon request. Customer information includes, for each applicant for assistance, each full name of the primary and secondary customer on each account, billing and service addresses, primary and secondary social security numbers, primary and secondary telephone numbers, Electric Service Identifier (ESI ID), service provider account number, and premise code;

(F) Applying the appropriate credit for assistance to an eligible customer's account, to the extent that program funds are available to that REP;

(G) Maintaining all records demonstrating compliance with subsections (d)(1)(A) through (d)(1)(C) of this section;

(H) Providing to the commission copies of materials regarding assistance provided to customers as necessary for commission monitoring and auditing purposes; and

(I) Fulfilling reporting requirements as required by §25.451 of this title.

(3) The commission's responsibilities shall include:

(A) Calculating the allocations prescribed by subsection (c)(1) of this section, and informing each REP of the REP's allocated amount.

(B) Monitoring the use of that portion of program funds determined pursuant to subsection (c)(1)(B) of this section. In the event that portion of program funds has been drawn down to a point at which REPs may not be fully reimbursed in the upcoming month for assistance provided to eligible customers, providing notice to REPs that they should discontinue the program unless they still have funds remaining available pursuant to subsection (c)(1)(A) of this section.

(C) Facilitating the reimbursement of REPs for credits provided to eligible customers through this one-time bill payment assistance program, as required by §25.451(j) of this title.

(g) Appeals process. A REP shall not authorize disconnection of a customer who meets the requirements of subsection (d)(1)(B) of this section before the protection afforded by that subsection has expired. A customer who believes the REP has erroneously determined that the household member does not qualify as seriously ill or disabled for the purpose of this program may submit a complaint to the REP or to the commission, pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling). The REP shall not disconnect the customer during the REP's review or supervisory review. The REP shall inform the customer of the customer's right to submit an informal complaint to the commission, pursuant to §25.485(e)(1)(A) of this title. In instances in which the REP receives from LIDA notice that the seriously ill or disabled person in the household does not qualify as a low-income person, the REP shall not submit authorization for disconnection of the customer until the eighth day after learning of the customer's ineligibility, in order to afford the customer time to receive notice of ineligibility and to appeal that determination if the customer so desires. In such circumstances, if the customer believes LIDA has erroneously determined that the seriously ill or disabled person does not qualify as a low-income person, the customer may appeal that eligibility determination as follows:

(1) The customer may request that LIDA review its determination, and the customer shall have seven days from the day of his or her request to LIDA to submit additional proof of eligibility. If, prior to the REP's submission of authorization for disconnection, the customer requests a review from LIDA and the REP receives notification from the customer of the request, the REP may not authorize disconnection of the customer until after the completion of LIDA's review of the application. LIDA shall conduct any such review within the two commission working days after the receipt of additional proof of eligibility from the customer, and shall inform the REP and the customer of its determination at that time. If upon review, LIDA affirms that the seriously ill or disabled person does not qualify as a low-income person, the REP may authorize disconnection of the customer after proper notice and not before the first day after the disconnection date in the notice. The REP may issue this notice any time after the REP receives notification of LIDA's determination upon review, and shall adhere to the requirements of §25.483(k) and (l) of this title.

(2) If the customer is not satisfied with LIDA's determination upon review, the customer may request in writing an informal

review by commission staff to determine the income status of the seriously ill or disabled household member.

(3) A customer who is dissatisfied with the commission staff's determination pursuant to paragraph (2) of this subsection may file a formal complaint pursuant to §22.242(e) of this title (relating to Complaints).

(4) A customer who appeals more than one rejected application for assistance in a given state fiscal year shall not have the protections from disconnection provided by this subsection available to him or her, and the REP shall not be required to issue a new disconnection notice pursuant to paragraph (1) of this subsection, for any appeal other than the first appeal of the state fiscal year. For the purpose of determining whether a customer has already appealed a decision in a state fiscal year, the stated date of disconnection in the disconnection notice used by the customer to apply for assistance shall be considered to be the date of appeal, even if the actual appeal was submitted in a subsequent state fiscal year. Any reconnection costs associated with such additional appeals shall be borne by the customer.

(h) Confidentiality of information.

(1) Any data acquired from HHSC pursuant to this section is subject to a HHSC confidentiality agreement.

(2) All data transfers pursuant to this section from REPs to LIDA shall be conducted under the terms and conditions of a standard confidentiality agreement to protect customer privacy and REP's competitively sensitive information.

(3) LIDA may use information obtained pursuant to this section only for purposes prescribed by commission rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 2, 2008.

TRD-200800018
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 22, 2008
Proposal publication date: August 3, 2007
For further information, please call: (512) 936-7223

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.497

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 and §39.903(j-1) (Vernon 2007) (PURA). PURA §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its power and jurisdiction. PURA §39.903(j-1) requires the commission to adopt rules governing the one-time bill payment assistance program provided by PURA §39.903(e)(1)(B).

Cross Reference to Statutes: PURA §14.002 and §39.903(j-1).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 2, 2008.

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Adriana A. Gonzales
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Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts the repeal of §26.51, relating to Continuity of Service, and new §26.51, relating to Reliability of Operations of Telecommunications Providers. The repeal of §26.51 is adopted without changes to the proposal as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6714). New §26.51 is adopted with changes to the proposed text and will be republished. The commission also amends Chapter 26, Subchapter C, Quality of Service, by changing the title to Infrastructure and Reliability.

New §26.51 establishes the minimum requirements for emergency operations plans maintained by telecommunications providers. Project Number 34594 is assigned to this proceeding.

On October 29, 2007, the commission received comments on the proposed repeal and new section from John Staurulakis, Incorporated (JSI), on behalf of Big Bend Telephone Company, Incorporated, Brazoria Telephone Company, Cameron Telephone Company, Central Texas Telephone Cooperative, Incorporated, Coleman County Telephone Cooperative, Incorporated, Community Telephone Company, Incorporated, Eastex Telephone Cooperative, Incorporated, Electra Telephone Company, Etex Telephone Cooperative, Incorporated, Hill Country Telephone Cooperative, Incorporated, Industry Telephone Company, Poka Lambro Telephone Cooperative, Incorporated, Riviera Telephone Company, Incorporated, Southwest Arkansas Telephone Cooperative, Incorporated, Tatum Telephone Company, Taylor Telephone Cooperative, Incorporated, and Valley Telephone Cooperative, Incorporated; Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas); Texas Commission on State Emergency Communications and the Texas 9-1-1 Alliance (the Texas 9-1-1 Agencies); Texas Statewide Telephone Cooperative, Incorporated (TSTCI); United Telephone Company of Texas, Incorporated d/b/a Embarq and Central Telephone Company of Texas d/b/a Embarq (Embarq); and Verizon Southwest, Bell Atlantic Communications, Incorporated d/b/a Verizon Long Distance, NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions, Verizon Select Services, Incorporated, MCImetro Access Transmission Services, LLC, and MCI Communications Services, Incorporated (Verizon).

On November 12, 2007, the commission received reply comments on the proposed repeal and new section from AT&T Texas; Embarq; Sprint Communications Company, L.P., Sprint-Com, Incorporated, Sprint Spectrum, L.P., Nextel of Texas, Incorporated, and NPCR, Incorporated (Sprint Nextel); Texas Cable & Telecommunications Association (TCTA); TEXALTEL; and TSTCI.

The commission posed three questions in this proceeding, which are listed below.

Question 1: In what ways have recent FCC orders increased state authority over wireless, voice over internet protocol (VoIP), and broadband over power lines (BPL) providers with regards to emergency preparedness? Please include any citations to applicable FCC orders.

The Texas 9-1-1 Agencies cited the recommendations from the "Impact of Hurricane Katrina on Communications Networks" (Katrina Report) developed by an Independent Panel commissioned by the Federal Communications Commission (FCC) as evidence that states should be allowed to set requirements for the telecommunications industry with regards to emergency preparedness. The FCC issued the following statement in its Independent Katrina Panel Notice of Proposed Rulemaking (NPRM):

"(W)e decline to take action to urge states to refrain from imposing emergency preparedness requirements on the communications industry..."

In the case of 9-1-1, the Katrina Report stated that state reporting requirements could be used to satisfy the FCC's reporting requirements.

Embarq argued that all facilities-based providers of voice services should be subject to the requirements set forth in this rule. They went on to state that the commission does have jurisdiction over non-nomadic VoIP providers. Embarq opined that this jurisdiction can be asserted whether these VoIP providers are defined as providers of "local exchange telephone service," "telecommunications utilities," or providers of "basic local telecommunications service" as defined in Public Utility Regulatory Act (PURA) §51.002. Embarq also pointed out that what separates the landmark FCC *Vonage Order*, in which the FCC preempted the Minnesota Public Utility Commission's attempt to force VoIP providers to succumb to the same level of state regulation as traditional carriers, was the inclusion of nomadic VoIP providers in the scope of the order (WC Docket No. 03-211, FCC 04-267). In its reply comments, TCTA argued in direct opposition to Embarq's position, stating that to-date the commission has declined to determine whether non-nomadic VoIP providers should be defined as "local exchange telephone service," "telecommunications utilities," or providers of "basic local telecommunications service." TCTA further opined that Embarq incorrectly concluded that the *Vonage Order* only preempted nomadic VoIP providers from state regulation. According to TCTA, the FCC concluded that all VoIP services should be exempt from state regulation.

Similarly, Embarq asserted that facilities-based wireless carriers that are receiving Universal Service Fund (USF) or Texas Universal Service Fund (TUSF) support should be subject to the requirements set forth in this rule. Embarq commented that the commission has limited jurisdiction over wireless carriers that are defined as "telecommunications providers," which includes a provider of commercial mobile service under PURA §51.002(10)(A)(iv). Specifically, Embarq argued that the commission may impose service quality standards on those wireless carriers that seek designation as an Eligible Telecommunications Carrier (ETC) or Eligible Telecommunications Provider (ETP) for the purposes of receiving USF or TUSF support.

Sprint Nextel replied that while it is designated as an ETC, the commission should seek other means to achieve the goal of emergency preparedness on the part of wireless carriers. That is, Sprint Nextel believed that it should be excluded from the proposed rule. It further opined that the competitive nature of the wireless industry forces companies to "continually improve their networks and communication protocols," and the addition of state regulation would likely stifle the improvement in service quality and reliability because of burdensome reporting requirements placed upon existing staff. Further, Sprint Nextel asserted that the commission has limited jurisdiction over Commercial Mobile Radio Service (CMRS), which has traditionally been regulated by the FCC.

In contrast to Embarq's comments, Verizon argued that the FCC has not extended the state's jurisdiction over VoIP, wireless, or BPL providers. Verizon went on to state that the commission should not interpret FCC rulings with regards to 9-1-1 or USF as an opportunity to extend its authority over these providers.

Similar to the comments of Verizon, AT&T Texas stated that the commission's authority over VoIP, wireless, or BPL has not been expanded. They cited the FCC's rules at 47 C.F.R. §4.9 and §4.11 as evidence for this claim and made particular reference to wireless carriers' outage reporting requirements. In its reply comments, Embarq agreed with AT&T Texas and Verizon regarding the limited jurisdiction of the commission over wireless carriers. However, Embarq further opined that wireless ETCs and ETPs are subject to regulation by the commission.

In contrast to Embarq's interpretation of the *Vonage Order*, AT&T Texas argued that the FCC took the position that states do not have the authority to decide whether certain regulations are applicable to DigitalVoice and other IP-enabled services. AT&T Texas further opined that the FCC has defined BPL-enabled Internet Access Service as an interstate, information service. As such, it cannot be subject to state regulation. In its reply comments, TCTA supported AT&T Texas' and Verizon's position on the exclusion of VoIP providers from this rulemaking proceeding.

Embarq replied that the commission should assert jurisdiction over all carriers for which it has the legal authority to do so, in order to maintain technological and competitive neutrality. Citing the FCC's recent *Contribution Order*, it was ordered that providers of "interconnected VoIP service" must contribute to the federal USF (FUSF) (WC Docket No. 06-122, CC Docket 96-45). While the order did not specifically mention contribution to the states' USFs, Embarq implied that the FCC may revisit the definition of interconnected VoIP providers, which may lead to some expansion of the states' jurisdiction over these providers.

Commission response

Certificate of convenience and necessity (CCN) and certificate of operating authority (COA) holders are the major facilities-based providers. They are primarily responsible for restoring service after an emergency event. Therefore, limiting the application of the rule to CCN and COA holders substantially achieves the objectives of the rule without imposing compliance costs on other service providers. The commission may consider expanding the rule to other service providers in a future rulemaking.

Question 2: Should utilities develop policies for disaster aid offerings for customers displaced by catastrophic events such as hurricanes and flooding (i.e., free remote call forwarding, waiver of deposits, etc.)? If so, to what extent should those policies and offerings be memorialized in a utility's tariff?

Embarq did not believe that utilities should be compelled to offer disaster aid or memorialize such offerings in their tariffs. Rather, Embarq argued that the very nature of catastrophic events war-

rants a unique and flexible response to each situation. Likewise, TSTCI argued that incumbent local exchange carriers (ILECs) should be afforded flexibility to "develop needed aid that (meets) the circumstances." Therefore, TSTCI proposed that disaster aid should be offered on a case-by-case basis rather than revising tariffs.

Verizon took a different position on this issue by arguing that utilities could develop special tariff offerings that would be utilized during emergency events. However, Verizon did offer a caveat that if such offerings are memorialized in utilities' tariffs, the commission should attempt to avoid issuing emergency orders that may negate the efforts of utilities' planning efforts for implementing the tariff offerings. JSI only partially supported this position by stating that a generic disaster aid clause might allow utilities to be responsive to the specific needs of customers during an emergency event while also maintaining flexibility in the type of assistance provided.

AT&T Texas stated that utilities should develop policies that would enable them to respond to the needs of customers during a catastrophic event. They did disagree with the notion of revising tariffs to include disaster aid offerings and believed utilities should be able to exercise flexibility in their offerings to customers, which will vary based on the emergency event.

Commission response

In the past, telecommunications utilities have responded in a helpful manner following an emergency event. The commission declines to pursue mandating such tariff revisions at this time but may revisit this issue in a future rulemaking.

Question 3: Under what circumstances should utilities notify the commission immediately regarding outages?

The Texas 9-1-1 Agencies asserted that an outage involving any component of a utility's 9-1-1 system merits immediate reporting to the commission. Further, they believe that notice of the outage should also be provided upon request to the 9-1-1 administrative entity, which is defined in §26.433 as a regional planning commission or an emergency communication district.

JSI argued that the only instance in which a utility should immediately report an outage to the commission is if "the utility has determined that its emergency plan cannot be implemented to restore service and the commission is in a position to provide assistance."

Embarq asserted that the reporting requirements of the commission should not be more burdensome than those set by the FCC in 47 C.F.R. §4, which states, in part, that "cable communications providers" and "wireline communications providers" must submit an electronic report within two hours following an outage lasting longer than 30 minutes that affects any facilities that they own, lease, or operate if it "potentially affects at least 900,000 user minutes of telephony service" or "potentially affects a 911 special facility." Within 72 hours, the providers are required to submit an Initial Communications Outage Report. Embarq further commented that the commission's current and proposed rules are concerned with the number of access lines affected.

Similar to the comments from Embarq, AT&T Texas, Verizon, TSTCI, and JSI urged the commission not to implement outage reporting requirements that may be in conflict with the FCC's requirements set forth in 47 C.F.R. §4.

Commission response

Embarq correctly pointed out that the commission is generally concerned with the number of access lines or customers affected by an outage rather than the number of user minutes. For a normal outage situation, data on the number of customers affected in a particular exchange facilitates the commission's ability to respond to customer inquiries and complaints and to ensure compliance with service quality standards. During an emergency event, data on the number of customers affected are also relevant to local jurisdictions, other state agencies, and the State Operations Center (SOC). Therefore, the commission declines to make changes to its outage reporting requirements based on these comments.

Subsection (a)

Embarq argued that the proposed rule is only applicable to facilities-based CCN holders and COA holders, which limits the application to ILECs. For competitive purposes, Embarq asserted that this rule should be made applicable to SPCOA facilities-based holders. Taken a step further, Embarq also suggested the inclusion of facilities-based providers of voice services despite the lack of a certification requirement for non-nomadic VoIP providers. TSTCI agreed with Embarq's position to include SPCOAs in the requirement to provide emergency operations plans (EOPs), in order to ensure competitive neutrality.

TEXATEL, TCTA, and Sprint Nextel wanted to exclude SPCOA holders from the requirement to provide EOPs.

Commission response

CCN and COA holders are the major facilities-based providers. They are primarily responsible for restoring service after an emergency event, and providers that lease facilities or resell services are dependent upon these providers. Therefore, limiting the application of the rule to CCN and COA holders substantially achieves the objectives of the rule without imposing compliance costs on SPCOA holders. The commission may consider expanding the rule to SPCOA holders in a future rulemaking.

Subsection (b)

AT&T Texas requested that it be allowed to file portions of its comprehensive summary confidentially to avoid creating a national security risk. AT&T Texas extended this argument to include any information and/or reports filed with the commission that contained competitively sensitive and/or highly sensitive information. Pointing to the protections afforded to reports filed with the FCC, AT&T Texas argued that the same protections should be afforded to items filed with the commission.

Commission response

The commission does not expect a provider to include competitively sensitive or highly sensitive information in its comprehensive summary. In any event, what information in a report filed with the commission is exempt from public disclosure is addressed by Texas Government Code, Chapter 552. As a result, the commission has deleted proposed subsection (b)(7).

Embarq argued that the requirement to file an emergency operations plan or even a "comprehensive summary" is unique because other state commissions do not require this type of filing. Embarq suggested that filing an affidavit instead of a comprehensive summary should be sufficient. If the commission insists on the filing of an affidavit, Embarq asserted that it should be signed by local management responsible for operations in the

State of Texas rather than a senior operations officer. JSI also argued that an affidavit is sufficient.

Commission response

The commission disagrees with requiring only an affidavit instead of a comprehensive summary. An affidavit does not provide the commission with a sufficient level of detail regarding a utility's emergency preparations.

The affidavit required by final rule subsection (b)(1) requires an affirmation about commitment to follow the EOP, in order to help ensure that the utility has adequately prepared for an emergency. However, the affirmation is not intended to preclude deviations from the EOP during the course of an emergency to the extent such deviations are appropriate under the circumstances. Further, the commission does not oppose the affidavit being signed by a local operation's officer and has deleted the term "senior" from subsection (b)(1) of the rule.

Subsection (b)(1)

Verizon suggested that the affidavit is unnecessary, but if the commission requires some kind of compliance statement, it more appropriately belongs in subsection (b)(3). They also suggested the following paragraph be stricken:

The filing shall include an affidavit from the utility's senior operations officer indicating that all relevant operating personnel within the utility are familiar with the contents of the emergency operations plan and are committed to following the plans and the provisions contained therein in the event of a system-wide or local emergency that arises from natural or manmade disasters.

Commission response

The commission believes that an affidavit is an appropriate component of an EOP. The requirement that the affidavit be signed by operating personnel helps ensure that utilities have fully considered their level of disaster preparedness. Further, this requirement should result in executive officers recognizing the need to update existing business continuity plans and/or disaster recovery plans. Therefore, the commission declines to make the requested change.

Verizon suggested the following wording change to the remainder of subsection (b)(1): To the extent the utility makes changes in its emergency operations plan, and the affected portion of the plan is no longer appropriately addressed under the utility's current comprehensive summary, the utility shall file a revision to the comprehensive summary no later than 30 days after such changes take effect.

Commission response

The commission has made this change, except that the adopted rule requires the filing of a revision no later than 30 days after a change to the EOP is adopted, rather than when the change takes effect. This change avoids an unwarranted delay in the filing of a revision if the effective date of a change is later than its adoption date.

JSI commented that providing the entire EOP would be more convenient than producing a comprehensive summary.

Commission response

The commission has amended subsection (b) to permit filing the EOP in lieu of a comprehensive summary.

Subsection (b)(2)(A)

Verizon suggested that the Telecommunications Service Priority (TSP) system does not require every TSP subscriber being "contacted" in case of an emergency and suggested the following wording changes:

A communications plan that describes the procedures for contacting the media, customers, and service users as soon as reasonably possible either before or at the onset of an emergency.

Embarq concurred with Verizon's proposed modifications. Embarq objected to a requirement to contact individual TSP subscribers during each emergency event.

Commission response

The commission has made the change proposed by Verizon. The commission does not expect utilities to notify individual TSP subscribers concerning an emergency event.

Subsection (b)(2)(E)

The Texas 9-1-1 Agencies recommended that a tornado plan be added to the list of items to be included in an EOP and should be similar to the hurricane plan. TSTCI argued that a tornado plan requested by the Texas 9-1-1 Agencies is unnecessary.

Commission response

The commission does not believe that sufficient tornado warning systems exist to warrant a separate tornado plan. Furthermore, tornadoes as well as floods, fires, and other natural disasters are covered under existing plans for disaster recovery and continuity of operations.

TSTCI suggested that the term "hurricane evacuation zone" be replaced with "hurricane-prone area."

Commission response

The commission disagrees with this suggestion. However, the commission has made the following change:

(E) a hurricane plan, including evacuation and re-entry procedures (for a utility providing service within a hurricane evacuation zone, as defined by the Governor's Division of Emergency Management).

Subsection (b)(3)

Texas 9-1-1 Agencies recommended the following language be added: Following the (a)nnual (d)rill, the utility shall assess the effectiveness of the (d)rill and modify its emergency operations plan as needed.

Commission response

The commission has made this change.

Verizon suggested adding the "familiarity and commitment to following emergency plans and procedures" language from subsection (b)(1) here because they believe this is the more appropriate place in the rule to address a utility's knowledge of its EOP. Verizon suggested that the 12-month period for the drill schedule is "needlessly ambiguous."

Commission response

In response to Verizon's comments, the commission has clarified subsection (b)(3) to require training of operating personnel responsible for implementing the procedures outlined in an EOP.

TSTCI suggested the following language:

Each utility shall conduct an annual review with all essential utility personnel to review and revise as necessary its emergency

procedures if those procedures have not been implemented in response to an actual event within the last 12 months. If a utility is in a hurricane-prone area, as defined by the commission, this review shall also include the utility's hurricane plan/storm recovery plan. Notice of this review will be attested to by the utility's senior operations officer and filed within 30 days of the annual review. Each utility shall conduct the annual review and file its notice and attestation together with its emergency contact information at the commission no later than May 1 of each year.

Commission response

The commission disagrees with these changes but does recognize the need to clarify the intent of subsection (b)(3). The commission appreciates TSTCI raising the issue regarding testing emergency procedures. The commission recognizes the potential ambiguity that arises by using the terms "exercises" and "drills" interchangeably. The commission intends for telecommunications utilities to test their procedures, but the commission does not want this requirement to be overly burdensome. Using the term drill, rather than exercise, more accurately conveys the commission's intentions concerning testing emergency procedures. The commission has re-named subsection (b)(3), "Drills."

Embarq stated that the term "drill" is too vague. Embarq opposed requiring an annual exercise or drill. Embarq asserted that full-scale exercises would be expensive and possibly unnecessarily burdensome.

Similar to the comments of Embarq, JSI suggested that requiring an annual drill to test emergency operations plans is unnecessarily burdensome for small ILECs.

Commission response

The commission disagrees with Embarq and JSI. The commission believes that drills are the proper way to test the effectiveness of emergency plans. The proposed rule is flexible in the types of drills in which a utility may participate. "Drills" include a tabletop exercise, and multiple utilities could participate in the same drill.

Subsection (b)(4)

The Texas 9-1-1 Agencies recommended that contact information be updated electronically and proposed the reduction in the timeframe for updating contact information from 30 to 10 days.

Commission response

The commission rejects Texas 9-1-1 Agencies' request to change the deadline for submitting updated contact information to 10 days following a change. The commission currently requires competitive local exchange companies (CLECs) and interexchange carriers (IXCs) to electronically update contact information in an annual report. Entering the contact information into the commission's database allows commission staff to send mass-notification e-mails and have contact information readily available. This annual report requires a login and password, which provides information security. Although contact information should remain up-to-date throughout the year, the current reporting interval is, at a minimum, once a year between June 1 and June 30 pursuant to §26.109 relating to Certification Criteria, §26.107 relating to Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Non-dominant Telecommunications Carriers, §26.109 relating to Standards for Granting Certificates of Operating Authority (COAs), and §26.111 relating to Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs). The commission expects to change the annual reporting interval for IXCs' and CLECs' to between January 1 and May 1 to ensure that emergency contact information is current prior to hurricane season. (See Project Number 29077 Rulemaking Proceeding Regarding PUC Substantive Rules, Chapter 26, Subchapter E). The commission expects to initiate another rulemaking to require incumbent local exchange carriers (ILECs) to provide the same emergency information.

TSTCI suggested that the requirement for utilities to review their plans annually, as outlined in subsection (b)(3), be combined with the requirement in subsection (b)(4), which requires the updating of emergency contact information.

Commission response

The intent of the annual review is for utilities to determine whether or not changes to existing procedures need to be made. The intent of updating contact information is to ensure that the commission is able to contact utilities in the event of an emergency. Therefore, the commission declines to make a change to the proposed rule.

Subsection (b)(5)

Sprint Nextel argued against imposing additional outage reporting requirements on telecommunications utilities. It supported the comments by others such as AT&T Texas, Embarq, and Verizon, which stated that the commission should adopt requirements that mirror those set by the FCC.

Commission response

As explained previously, the commission needs different information than what is provided in the FCC reports. The commission must provide the SOC and the governor's office with information concerning the extent of any damage and the timeline for service restoration following a natural disaster. However, the commission does recognize the need to provide more specific reporting requirements and has made changes to subsection (b)(5) accordingly.

Subsection (b)(7)

JSI commented that providing the entire EOP would be more convenient than producing a comprehensive summary.

Commission response

As stated previously, the commission has changed subsection (b) to permit filing the EOP in lieu of a comprehensive summary and has deleted subsection (b)(7).

Subsection (b)(8)

JSI commented that providing the entire EOP would be more convenient than producing a comprehensive summary.

Commission response

As stated previously, the commission has changed subsection (b) to permit filing the EOP in lieu of a comprehensive summary. The commission has deleted proposed subsection (b)(8), because it is superfluous.

Subsection (c)(1)

Verizon challenged the requirements in subsection (c)(1) to restore service within the shortest reasonable time. They argued that this requirement does not serve a "rational purpose." To that end, they offered the following proposed language for subsection (c)(1), which they believed represented a reasonable expecta-

tion on the part of the commission: Every utility shall make all reasonable efforts to prevent interruptions of service. When interruptions occur, the utility shall restore service as soon as practicable, with priority of restoration taking into account such matters as the extent of repairs necessary, needs of the community and minimization of danger to the public, emergency personnel and the utility's workers.

Commission response

The commission adopts Verizon's proposed change.

Subsection (c)(2)

Verizon argued that the clause in subsection (c)(2), which requires companies to give instructions to its employees during an emergency is unnecessary, because these instructions are part and parcel to any emergency event. Therefore, Verizon proposes the deletion of this clause.

Commission response

The commission agrees and adopts this change.

Subsection (e)

AT&T Texas cited the FCC's Outage Reporting Requirements in 47 C.F.R. §4.9(f) and suggested that the commission consider establishing a similar "threshold criteria" and again urged the commission not to adopt requirements that exceed the FCC's requirements. Embarq also suggested the use of thresholds by the commission.

Verizon argued that the FCC's Outage Reporting Requirements should serve as a substitute for the commission's requirements. Therefore, utilities should submit a simultaneous report to the FCC and the commission.

In its reply comments, TSTCI agreed with Verizon, and stated that outage reporting requirements that strayed from the FCC's reporting requirements would be burdensome.

Commission response

As previously explained, the commission rejects these comments because the FCC reporting requirements do not satisfy the data needs of the commission.

In its reply comments, TEXALTEL sought clarification on the applicability of the outage reporting requirements. TEXALTEL believed that only CCN and COA holders should be required to comply with the reporting requirements in subsection (e).

Commission response

As previously stated, the rule is applicable only to CCN and COA holders.

Subsection (e)(5)

The 9-1-1 Agencies, Embarq, and AT&T Texas suggested that the commission clarify the term "major outages," as it is used in the context of service interruptions lasting less than four hours. The 9-1-1 Agencies also suggested that the commission revise subsection (e)(5) of the proposed rule to include "all components of the 9-1-1 system" in the reporting requirements for service interruptions.

AT&T Texas agreed that 9-1-1 outages should be reported to the commission but believed the suggested rule language offered by the 9-1-1 Agencies may require reporting even if service is not affected. Therefore, AT&T Texas argued that the change is unnecessary. In its reply comments, TSTCI argued that the language proposed by 9-1-1 Agencies was unnecessary and lacked specificity. Therefore, TSTCI believed that the language should remain unchanged.

Commission response

The commission has revised the rule to require reporting of 9-1-1 outages that affect service. The commission understands that the term "major outage" may appear ambiguous to some providers but setting a minimum threshold as to the number of customers affected is not warranted at this time. The commission agrees with AT&T Texas that an interruption of service affecting the 9-1-1 system should be reported to the commission as soon as reasonably possible. The 9-1-1 Agencies also made an argument to expand the reporting requirements for "all components of the 9-1-1 system." However, it should be clarified that the commission believes that only outages affecting 9-1-1 service should be reported, and has changed the rule accordingly.

Subsection (f)

TSTCI stated that the language contained in subsection (f)(1) and (2) are no longer applicable and should be deleted from the proposed rule. They stated that local exchange carriers (LECs) may not be aware of the type of customer premise equipment being used by an end-use customer. Further, they pointed out that the "notice of change in network arrangements" are outlined in 47 C.F.R. §51 of the FCC's rules, which applies to interconnected carriers. TSTCI also stated that small carriers (presumably CLECs) that use the NECA Access Tariff must notify other carriers of network changes.

Commission response

The commission requires information regarding changes in network status so as to promote service quality standards. Since the commission does not have access to FCC reports, the commission will not delete this subsection from the rule.

All comments, including those not specifically discussed herein, were fully considered by the commission.

SUBCHAPTER C. QUALITY OF SERVICE

16 TAC §26.51

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §14.001, which provides the commission with the power to regulate a public utility and to do anything designated or implied to carry out that power; §14.003, which provides the commission with the authority to require a public utility to file a report regarding information related to the utility and to establish the form, time, and frequency of the report; §14.151, which provides the commission with the authority to prescribe the form of the records to be kept by a public utility; §14.153, which provides the commission with the authority to adopt rules governing the communication between the regulatory authority and the public utility; §51.001, which provides the commission with the authority to make and enforce rules necessary to protect customers of telecommunications services consistent with the public interest; §52.001, which states that it is the policy of this state to protect the public interest in having adequate and efficient telecommunications services; §52.002, which provides the commission with exclusive original jurisdiction over the business and property of a telecommunications utility in this state in order to carry out the public policy stated in §52.001; §52.106,

which provides the commission with the authority to require that the quality of telecommunications service be adequate to protect the public interest; §55.001, which requires a utility to furnish safe, adequate, efficient, and reasonable service; §55.002, which provides the commission with the authority to adopt reasonable standards for a public utility to follow, to adopt standards for measuring the quantity and quality of service, to adopt rules for examining, testing, and measuring a service, and to adopt rules to ensure the accuracy of equipment; §55.005, which prohibits a public utility from providing an unreasonable preference to a person in a classification; and §55.006, which prohibits discrimination and restriction on competition.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.003, 14.151, 14.153, 51.001, 52.001, 52.002, 52.106, 55.001, 55.002, 55.005 and 55.006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 4, 2008.

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Adriana A. Gonzales
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For further information, please call: (512) 936-7223

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SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §26.51

The new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §14.001, which provides the commission with the power to regulate a public utility and to do anything designated or implied to carry out that power; §14.003, which provides the commission with the authority to require a public utility to file a report regarding information related to the utility and to establish the form, time, and frequency of the report; §14.151, which provides the commission with the authority to prescribe the form of the records to be kept by a public utility; §14.153, which provides the commission with the authority to adopt rules governing the communication between the regulatory authority and the public utility; §51.001, which provides the commission with the authority to make and enforce rules necessary to protect customers of telecommunications services consistent with the public interest; §52.001, which states that it is the policy of this state to protect the public interest in having adequate and efficient telecommunications services; §52.002, which provides the commission with exclusive original jurisdiction over the business and property of a telecommunications utility in this state in order to carry out the public policy stated in §52.001; §52.106, which provides the commission with the authority to require that the quality of telecommunications service be adequate to protect the public interest; §55.001, which requires a utility to furnish safe, adequate, efficient, and reasonable service; §55.002, which provides the commission with the authority to adopt reasonable standards for a public utility to follow, to adopt standards for measuring the quantity and quality of service, to adopt rules for examining, testing, and measuring a service, and to adopt rules to ensure the accuracy of equipment; §55.005, which prohibits a public utility from providing an unreasonable preference to a person in a classification; and §55.006, which prohibits discrimination and restriction on competition.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.003, 14.151, 14.153, 51.001, 52.001, 52.002, 52.106, 55.001, 55.002, 55.005 and 55.006.

§26.51. Reliability of Operations of Telecommunications Providers.

(a) Application. Unless the context clearly indicates otherwise, in this section the term "utility," insofar as it relates to telecommunications utilities, shall refer to local exchange companies that are facilities-based providers, as defined in §26.5(85) and (119) of this title (relating to Definitions).

(b) Emergency Operations Plan. Each utility shall file with the commission a copy of its emergency operations plan or a comprehensive summary of its emergency operations plan by May 1, 2008.

(1) Filing requirements. The filing shall include an affidavit from the utility's operations officer indicating that all relevant operating personnel within the utility are familiar with the contents of the emergency operations plan; and such personnel are committed to following the plans and the provisions contained therein in the event of a system-wide or local emergency that arises from natural or man-made disasters, except to the extent deviations are appropriate under the circumstances during the course of an emergency. To the extent the utility makes changes in its emergency operations plan, the utility shall file the revised plan or a revision to the comprehensive summary that appropriately addresses the changes to the plan no later than 30 days after such changes take effect.

(2) Information to be included in the emergency operations plan. Each emergency operations plan maintained by a utility shall include, but is not limited to, the following:

(A) A communications plan that describes the procedures for contacting the media, customers, and service users as soon as reasonably possible either before or at the onset of an emergency. The communications plan should also:

(i) address how the utility's telephone system and complaint-handling procedures will be augmented during an emergency;

(ii) identify key personnel and equipment that will be required to implement the plan when an emergency occurs;

(B) priorities for restoration of service;

(C) a plan for disaster recovery and continuity of operations;

(D) a plan to provide continuous and adequate service during a pandemic; and

(E) a hurricane plan, including evacuation and re-entry procedures (for a utility providing service within a hurricane evacuation zone, as defined by the Governor's Division of Emergency Management).

(3) Drills. Each utility is required to train its operating personnel in the proper procedures for implementing its emergency plan. Each utility shall conduct or participate in an annual drill to test its emergency procedures unless it has implemented its emergency procedures in response to an actual event within the last 12 months. If a

utility is in a hurricane evacuation zone (as defined by the Governor's Division of Emergency Management), this drill shall also test its hurricane plan/storm recovery plan. The commission should be notified no later than 21 days prior to the date of the drill. Following the annual drill, the utility shall assess the effectiveness of the drill and modify it emergency operations plan as needed.

(4) Emergency contact information. Each utility shall submit emergency contact information in a form prescribed by commission staff by May 1 of each calendar year. Notification to commission staff regarding changes to the emergency contact list shall be made within 30 days. This information will be used to contact utilities prior to and during an emergency event.

(5) Reporting requirements. Upon request by the commission staff during a SOC inquiry or declared emergency event, affected utilities shall provide updates on the status of operations, outages and restoration efforts. Updates shall continue until all event-related outages are restored or unless otherwise notified by commission staff.

(6) Copy available for inspection. A complete copy of the above plans shall be made available at the utility's main office for inspection by the commission or commission staff upon request.

(c) Continuity of service.

(1) Every utility shall make all reasonable efforts to prevent interruptions of service. When interruptions occur, the utility shall restore service as soon as practicable, with priority of restoration taking into account such matters as the extent of repairs necessary, needs of the community and minimization of danger to the public, emergency personnel and the utility's workers.

(2) Each utility shall make reasonable provisions to manage emergencies resulting from failure of service.

(3) In the event of a national emergency or local disaster resulting in disruption of normal service, the utility may, in the public interest, deliberately interrupt service to selected customers to provide necessary service for the civil defense or other emergency service agencies temporarily until normal service to these agencies can be restored.

(d) Record of interruption. Except for momentary interruptions caused by automatic equipment operations, each utility shall keep a complete record of all interruptions, both emergency and scheduled. This record shall show the cause for interruptions, date, time, duration, location, approximate number of customers affected, and, in cases of emergency interruptions, the remedy and steps taken to prevent recurrence.

(e) Report to commission. The following guidelines are a minimum basis for reporting service interruptions. Any report of service interruption shall state the cause(s) of the interruption. Utilities should report major outages lasting less than four hours in a timely manner or as soon as reasonably possible. Utilities shall notify the commission in a timely manner in writing of interruptions in service lasting four or more hours affecting:

(1) 50% of the toll circuits serving an exchange;

(2) 50% of the extended area service circuits serving an exchange;

(3) 50% of a central office;

(4) 20% or more of an exchange's access lines; or

(5) any component of the 9-1-1 system that results in an outage to the 9-1-1 service.

(f) Change in character of service.

(1) If any change is planned or made by the utility in the type of service rendered by the utility that would adversely affect the efficiency or operation of the customer equipment connected to the utility's network, the utility shall notify the affected customer at least 60 days in advance of the change or within a reasonable time as practicable.

(2) This paragraph applies only to local exchange companies that are dominant carriers, as defined in §26.5(66) of this title. Where change in service requires dominant carriers to adjust or replace standard equipment, these changes shall be made to permit use under such changed conditions, adjustment shall be made by the dominant carrier without charge to the customers, or in lieu of such adjustments or replacements, the dominant carrier may make cash or credit allowances based on the duration of the change and the degree of efficiency loss.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 4. SCHOOL LAND BOARD

CHAPTER 154. LAND SALES, ACQUISITIONS, AND TRADES

31 TAC §154.1

The General Land Office (GLO), with the approval of the School Land Board (Board), adopts amendments to 31 TAC, Part 4, Chapter 154, relating to Land Sales, Acquisitions, and Trades, §154.1, relating to Sale of Small Tracts (320 Acres and Less). The amendments are adopted without changes to the proposed text published in the October 12, 2007, issue of the *Texas Register* (32 TexReg 7228).

The adopted amendments address the Board's authority to sell certain Permanent School Fund (PSF) lands and to grant a preferential right to surrounding land owners to purchase PSF lands. The amendment to the title of §154.1 deletes the reference to small tracts of 320 acres or less. The amendment of §154.1(a)(2) modifies the definition of "preferential right" so that it is consistent with the applicable statutes. The addition of §154.1(a)(3) and (4) includes definitions for "participating owner" and "non-participating owner" to make the rule more readable and easier to follow.

The adopted amendment of §154.1(b)(1) adds a statement of the Board's authority to sell PSF land. The amendment of §154.1(b)(2) clarifies that the Board may not convey property for less than the market value. The amendment of §154.1(b)(3) clarifies that the Board shall determine the market value of the land in accordance with Texas Tax Code, §1.04, consistent with Texas Natural Resources Code, §51.001(11). The amendment

of §154.1(c)(1) conforms the rule to Texas Natural Resources Code, §51.052. The amendment of §154.1(c)(2) adds conforming language. The amendment of §154.1(c)(3) clarifies the notice that must be provided to surrounding land owners when a preferential right is considered by the Board.

The amendments of §154.1(d)(1) - (3) clarify the duties of the Board, the GLO, and surrounding land owners when multiple surrounding land owners exist and the Board grants a preferential right. The amendment of §154.1(d)(4) conforms the rule to Texas Natural Resources Code, §51.052, and adds language to address situations in which certain surrounding land owners cannot be located or otherwise fail to waive a preferential right granted by the Board. The amendment of §154.1(d)(5) clarifies the requirements for surveys. Finally, the amendment of §154.1(e) makes a non-substantive clarification.

The GLO did not receive any comments on the proposed amendments.

REASONED JUSTIFICATION/FACTUAL BASIS

The adopted amendments are required to incorporate statutory changes to Texas Natural Resources Code, §51.052, as amended by the 79th Legislature in H.B. 2217, effective June 18, 2005. Furthermore, this rulemaking clarifies the procedures by which the Board may grant a preferential right for the purchase of PSF land, addresses procedural impediments to potential preferential purchasers, and allows greater flexibility in selling PSF property to surrounding land owners. The public will benefit because the amendments will provide more clarity and a more effective procedure for exercising a preferential right granted by the Board.

MAJOR ENVIRONMENTAL RULE ANALYSIS

Pursuant to Texas Government Code, §2001.0225, a regulatory analysis is not required for the rulemaking as a "major environmental rule." The adopted rulemaking will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking does not exceed a standard set by federal law, does not exceed an express requirement of state law, does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state or federal program, and is not adopted solely under the general powers of the GLO.

STATUTORY AUTHORITY

The amendments are adopted under the authority granted in Texas Natural Resources Code, §31.051, which provides the Commissioner of the GLO the authority to make and enforce suitable rules consistent with the law; §51.014, which provides the Commissioner of the GLO the authority to adopt rules necessary to carry out the provisions of Texas Natural Resources Code, Chapter 51; and §51.052, which requires the Board to adopt rules to implement a preferential right.

Texas Natural Resources Code, §51.052, is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Trace Finley

Deputy Commissioner, Policy & Governmental Affairs, General Land Office

School Land Board

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For further information, please call: (512) 475-1859

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development Board (board) adopts amendments to §§356.1 - 356.7, 356.9, and 356.10; the repeal of §§356.11 - 356.13 and new §356.11 and §356.12 of Subchapter A, concerning Groundwater Management Plan Approval; the amendment to §356.22, dealing with the Designation of Groundwater Management Areas under Subchapter B; and new Subchapter C, §§356.31 - 356.35, addressing the Submittal of Desired Future Conditions; and new Subchapter D, §§356.41 - 356.46, to govern Appealing Approval of Desired Future Conditions. Sections 356.2, 356.5, 356.6, 356.34, and 356.42 - 356.46 are adopted with changes to the proposed text as published in the October 19, 2007, issue of the *Texas Register* (32 TexReg 7368). Sections 356.1, 356.3, 356.4, 356.7, 356.9 - 356.12, 356.22, 356.31 - 356.33, 356.35, 356.41 and the repeal of §§356.11 - 356.13 are adopted without changes and will not be republished.

The rule amendments and new rules function to provide clarification, to improve grammar and readability, to define the processes and procedures associated with this chapter, and to better align the rules with existing statutory requirements contained in Chapter 36, Water Code, relating to Groundwater Conservation Districts. In particular, the reorganization and expansion of Chapter 356, including the creation of new Subchapters C and D, are adopted by the board to provide a clearer organizational structure for the rules to benefit staff, members of the public, and groundwater conservation districts in their efforts to manage the groundwater resources of the state. The changes also reflect increased opportunity for public participation in the management of those resources.

Amendments to 31 TAC Chapter 356, Subchapter A, relating to Groundwater Management Plan Approval:

§356.1

The board adopts §356.1 without changes to the proposed text. The board received no comments on this section.

§356.2

The board adopts §356.2 with changes to the proposed text.

§356.2(2), definition of "Amount of groundwater being used on an annual basis," is adopted without changes to the proposed text. Three commenters suggested that the definition in §356.2(2) include a mandatory estimate of exempt uses because exempt uses can constitute a large volume of water. The commenters state it is imperative that groundwater conservation districts account for this usage within their estimations of annual groundwater withdrawals. The board disagrees with this

suggested change because the board considers the amount of groundwater being used as including all uses, including exempt uses.

§356.2(8), definition of "desired future conditions," is adopted with changes to the proposed text. One commenter suggests inserting "for a specified aquifer within the management area" to better align the rule with Water Code §36.108(d), which requires districts to consider groundwater availability models and other data or information and to establish desired future conditions for the relevant aquifers within the management area. The board agrees with the commenter and adopts §356.2(8) with the suggested language. In addition, the board adds "through at least the period that includes the current planning period for the development of regional water plans pursuant to §16.053, Water Code" to the definition. This change is necessary to ensure that desired future conditions are presented in a manner allowing for adequate consideration and usage in ongoing regional and state water planning efforts. This information aids regional water planning group efforts in performing the statutory mandate to develop strategies that meet identified needs. Strategies can then be incorporated into regional and state water plans. The purpose of this change is to ensure coordination and consistency among planning entities.

One commenter stated that the requirement in §356.2(8) that a desired future condition be physically possible is ludicrous because a desired future condition is not made in a vacuum. The board disagrees because it is possible that a desired future condition could be submitted that may be physically impossible. Therefore, the board will make such a determination when considering the reasonableness of a desired future condition.

The board adopts §356.2(13), definition of "managed available groundwater," with changes to the proposed text. Ten commenters suggested that this definition needs clarification because the Water Code §36.1132 requires districts to issue permits for a managed available number "to the extent possible." The commenters note that at issue is the water pumped for exempt uses and how it figures into a managed available groundwater number. One suggestion was to state, as part of the definition, the amount a district can permit up to does not include exempt use. Most urged that "to the extent possible" be inserted into the definition to account for the effects of non-permitted exempt use. They note that the amounts not available for permitting should not be included in the definition and suggest that subtracting exempt use estimates from overall or gross managed available groundwater availability would yield an amount intended by statute. The board agrees with the suggestion to add "to the extent possible" and incorporates that phrase into §356.2(13) in order to be consistent with Water Code §36.1132 and to allow non-permitted uses to be accounted for, including the amounts pumped.

One commenter also suggest adding additional language at the end of §356.2(13) stating "after allowance for the estimated exempt use of the aquifer" to further assist in accounting for exempt use. The board disagrees and makes no change to the proposed text in response to this comment because it is the districts' responsibility to permit groundwater use and the issue of whether to consider exempt uses is more appropriately addressed by groundwater conservation districts.

Two commenters stated that the current definition is fine and wanted assurance that the proposed definition would not result in disparity between the groundwater availability numbers provided to the regional water planning groups by groundwater conservation districts and subsidence districts. The commenters noted that subsidence districts issue groundwater permits as a percentage of a permit holder's total water demand and on certified groundwater reduction plans, thus the managed available groundwater numbers inside those districts should equal the amount of groundwater actually permitted. The board makes no change to the proposed text based on this comment because, as adopted, the added words "to the extent possible" do not change the meaning as it existed in the original definition.

§356.2(17)

The board adopts §356.2(17) with changes from the proposed text. One commenter suggests the definition of a person with a legally defined interest in groundwater is not clear regarding court orders or judgments and suggests adding "or otherwise has an interest in groundwater in the district" before "as granted by court order or judgment." The board agrees with the commenter and adds the additional language to clarify the type of interest granted by a court order or judgment. The additional language is also consistent with the board's intent to include persons whose groundwater interests have been adjudicated by a court, rather than a person who has only filed suit. In like manner, the board changes the proposed text by striking the language "or an application pending," consistent with the board's intent to include a person who has obtained authorization from a groundwater district to produce groundwater, rather than a person who has only filed an application.

Three commenters suggested that §356.2(17) should remain unchanged because it provides the board with necessary flexibility to address the variety of different fact situations that are likely to be presented with respect to who may be a person with a legally defined interest in groundwater. The board disagrees and makes the changes to the proposed text for the reasons described in the preceding paragraph.

§356.3

The board adopts §356.3 without changes to the proposed text. The board received no comments on this section.

§356.4

The board adopts §356.4 without changes to the proposed text. A commenter suggests that the rule no longer obligates groundwater conservation districts to forward their new approved management plans to regional water planning groups. The board disagrees. The board believes the rule simplifies the prior language and still requires that any approved plans be submitted to the chairs of the regional water planning groups.

§356.5

The board adopts §356.5 with a change to the proposed text. Three commenters suggested that the rule is confusing because it states that "[e]ach district shall use the district's best available data and information" and may be read to limit a district to data or information that it possesses. The commentators suggest striking the term "district's" to simplify and expand the sources of data and information any one district may use. The board agrees and deletes the word "district's" in §356.5(b).

Three commenters suggest that this rule requires no explanation for an omission from the groundwater management plan as originally required other than simply stating that a particular element is not required or is not cost-effective. The commenters also propose the rule identify a standard for evaluating cost-effectiveness. The board makes no changes based on these com-

ments. The board believes that the rule as written still requires an explanation. Also, the board believes cost-effectiveness has a high degree of variability and is dependant on factors unique to each situation, thus not providing a cost-effectiveness standard is preferable.

A commenter suggests that the preamble explanation allowing for the publication of proposed or existing groundwater conservation district rules should clarify that a groundwater conservation district's rules are still part of the management plan and thus subject to the Texas Water Development Board's review and approval. The board makes no change to §356.5 based on this comment. The district's rules are part of the management plan under Water Code §36.1071(e)(2). The board reviews the items submitted and approves a management plan if it is administratively complete, under Water Code §36.1072(b).

§356.6

The board adopts §356.6 with a change to the proposed text. A commenter suggested that the preamble explanation allowing for the publication of proposed or existing groundwater conservation district rules should clarify that the district's rules are still part of the management plan and thus subject to the Texas Water Development Board's review and approval. The board makes no change based on this comment because the suggestion is already addressed statutorily. However, the word "and" is added to subsection (a)(5) for clarity.

§356.7

The board adopts §356.7 without changes to the proposed text. The board received no comments on this section.

§356.9

The board adopts §356.9 without changes to the proposed text. A commenter suggested that a groundwater district's approval of amendments to a groundwater management plan should incorporate newly developed desired future conditions and managed available groundwater numbers. The board makes no change based on this comment. The purpose of the rule amendment is to clarify that groundwater districts are not required to completely redo a management plan for nonsubstantive amendments. This provides the districts some flexibility where their groundwater management plans may be nearing the end of their five-year life cycle. This flexibility allows groundwater districts to avoid waste because they must revisit their plans at least every five years anyway.

§356.10

The board adopts §356.10 without changes to the proposed text. The board received no comments on this section.

§356.11

The board adopts §356.11 without changes to the proposed text. A commenter stated that training on data collection and methodology is critically important and suggested that the board provide training at least once every five years. The board makes no change based on this comment. Current statutory authorization is only permissive, not mandatory, and the board does not have staff flexibility to accommodate a more structured and regular program.

§356.12

The board adopts §356.12 without changes to the proposed text. The board received no comments on this section.

Amendments to 31 TAC Chapter 356, Subchapter B, relating to Designation of Groundwater Management Areas:

§356.22

The board adopts §356.22 without changes to the proposed text. The board received no comments on this section.

Amendments to 31 TAC Chapter 356, Subchapter C, relating to Submittal of Desired Future Conditions:

§356.31 and §356.32

The board adopts §356.31 and §356.32 without changes to the proposed text. The board received no comments on these sections.

§356.33

The board adopts new §356.33 without changes to the proposed text. Three commenters suggested that the board does not have the authority to set a deadline of January 1, 2008, for districts opting to submit desired future conditions in time to be incorporated into the next state water plan. The board disagrees. The board has authority in Water Code §16.051 and §16.053 to develop procedures regarding the development of regional water plans and the state water plan. The purpose of the January 1, 2008, deadline is to provide notice to districts that desired future conditions should be submitted to the board by that date in order to ensure that the district's efforts are included in the upcoming state water plan due for release on January 5, 2012. This is because the regional water planning groups need managed available groundwater numbers from the board well before September 1, 2010, to include the numbers in their regional water plans. Thus, this rule is necessary to support timely and useful coordination among groundwater conservation districts, regional water planning groups, and board staff.

§356.34

The board adopts §356.34 with changes to the proposed text. Two commenters suggested that §356.34(1), the requirement that multiple desired future conditions for the same aquifer in a groundwater management area need to be compatible, should track the legislature's desire for consistency by using the term "consistent" rather than "compatible" because the term "compatible" could have different meanings. The board disagrees because its use of the term "compatible" is intended to mean the same as the dictionary definition "able to exist together with something else." Nonetheless, the board changes the proposed text to the term "physically compatible" in order to be consistent with the definition of "desired future condition" in §356.2(8) as adopted, and to clarify that desired future conditions must be "physically compatible" so that multiple desired future conditions for the same aquifer may be integrated into groundwater models or other analysis tools for that aquifer.

Three commenters suggested that §356.34 list of items that must be submitted to the board with the desired future conditions also include evidence of notices of the joint planning meetings. The board disagrees because the list of items in §356.34 are the minimum items required for the board's review, rather than an exhaustive list, and the board's executive administrator may require additional information under §356.34(5), if needed.

Four commenters suggested that §356.34 list of items that must be submitted to the board with the desired future conditions include an estimate(s) of the exempted use of an aquifer to assist in accounting. The board disagrees because the list of items in §356.34 are the minimum items required for the board's review,

rather than an exhaustive list, and the board's executive administrator may require additional information under §356.34(5) if needed.

§356.35

The board adopts new §356.35 without changes to the proposed text. The board received no comments on this section.

General Comments

The board adopts Subchapter D, §356.41 without changes to the proposed text and §356.42 - 356.46 with changes to the proposed text. The board received twenty four general comments relating to Subchapter D; all of the twenty four commenters opposed the rules because they believed that the board's proposed rules would create state, instead of local, control of groundwater resources. The board responds to these comments by making changes to the proposed text as described herein and by deleting the language in proposed subsection (c) of §356.46 which provided for board approval of the desired future condition.

One commenter requested clarification on the role of the board upon receipt of a desired future condition from districts located in a groundwater management area. The board's responsibilities are to issue a managed available groundwater number to the districts and to administer a petition process. These responsibilities are set forth in Water Code §36.108(o), (l), (m) and (n) respectively.

§356.41

The board adopts §356.41 relating to scope of subchapter without changes from the proposed text. The board received no comments on this section.

§356.42

The board adopts §356.42 relating to definitions with changes to the proposed text. . The board received four comments relating to definitions. The board adopts §356.42 with seven definitions instead of the proposed five definitions. The added definitions are "executive administrator" and "districts." These additions clarify the distinction between the role of the board and of the executive administrator and highlight the role of the districts as respondents in the petition process. The board also reworded certain definitions in response to comments and for the purposes of clarity and consistency throughout the subchapter. Finally, the board rearranged the definitions in alphabetical order for ease of use.

One commenter requested a revision of the definition of "petitioner" under paragraph (1) of §356.42 to clarify that a district and a subsidence district were both eligible to file a petition. The board is not making the change requested by the commenter because the term "districts," defined in Water Code §36.001, includes subsidence districts. Therefore, adding subsidence districts to the definition is redundant. The board notes that the language in Water Code §36.108 appears to provide an opportunity for a district or for a district in or adjacent to the groundwater management area or the regional water planning group in the groundwater management area to file a petition. Therefore, based on the comment requesting clarification that districts may challenge the adopted desired future condition, the board is changing the definition of petitioner in §356.42 to include language that is used in Water Code §36.108(l).

One commenter requested a change to the definition of "evidence" in paragraph (4) of §356.42 to state clearly that the districts' response is part of the evidence. The board with the commenter and is changing the definition of "evidence" to include all testimony and information provided without reference to the provider. Another commenter requested that definition of evidence include a statement that the information must show the districts did not establish a reasonable desired future condition. The board agrees and is adopting a revised definition of "evidence" to emphasize that evidence presented at a hearing and in a petition must be relevant to the issue of reasonableness of the desired future condition. One commenter requested that the rule use consistent language regarding the word "evidence" and delete references using the word "information." The board agrees with this commenter and is changing the word "information" to "evidence" in adopted §356.44(f) for clarity and consistency of language. However, in other instances, the word information is appropriate particularly where describing the contents of the petition. Additionally, the board has revised the definition of evidence to include the word information.

One commenter noted that the definition of "adopted desired future condition" at paragraph (5) of §356.42 should not include the process used for adoption. The board agrees that the description of the process is not necessary to the definition and is deleting the description of the process. Another commenter requested that the definition of adopted desired future conditions contain the words "such districts" in reference to the districts providing notice. The board disagrees because the notice process is not essential to the appeal and because Water Code §36.108(e) requires notice. Therefore, in response to these comments, the board is amending the definition of adopted desired future conditions by deleting the description of the adoption, but including a reference to the statute.

§356.43

The board adopts §356.43 relating to petition and evidence with changes to the proposed text. The board has changed the title of §356.43 to Petition: Reviewability; Form; Receipt; Postponement; Rebuttal and Joinder to more accurately describe the topics addressed in the section. The board has reorganized the adopted section by providing subtitles. These changes are designed to make the rules more user friendly. The board received forty-one comments on proposed §356.43. The proposed text of §356.43 contained subsections (a) through (h) but the adopted section contains (a) through (f) resulting from reorganization. Adopted subsection (a) relating to reviewability provides the prerequisites to filing a petition with the board. Adopted subsection (b) relating to form and contents of petition describes the minimum necessary information that must be included in a petition. Adopted subsection (c) relating to receipt of petition and acknowledge provides that the board will formally acknowledge receipt of a petition. Adopted subsection (d) relating to respondents request for postponement provides that a district may request that the board postpone action on a petition to allow efforts for consultation and resolution of the issues raised in the petition. Adopted subsection (e) relating to respondent's rebuttal to petition allows, but does not require, the respondent district to present evidence to the board and the petitioner prior to the hearing. Adopted subsection (f) relating to joinder of petitions authorizes the executive administrator to join multiple petitions.

One commenter suggested that the board revise paragraph (1) of subsection (a) of §356.43 by specifically stating the petition submitted to the districts, prior to submission to the board, must include any evidence showing the desired future condition is not reasonable. The board is not making a change based on this comment because the proposed rule does require that the peti-

tion be accompanied by evidence pursuant to subsection (c) of proposed §356.43. Therefore, adding the requested language is redundant. However, the board will clarify that the petition must meet the requirements of adopted subsection (b), which requires the evidence be included with the petition, when submitted to the districts.

One commenter contended that the one year period to challenge a desired future condition under paragraph (3) of subsection (a) of §356.43 was inappropriate and not authorized by statute. The board disagrees with the commenter. The board notes that the language of Water Code §36.108 is relatively generic relating to the petition and the hearing. The board has the legal authority to adopt rules providing procedures related to the petition and the hearing thereon. A degree of detail is necessary to provide petitioners and respondents with notice and certainty about the process and to explain the board's process and provide for orderly and timely resolution of the issues presented in petition. The board is adopting paragraph (3) of subsection (a) of §356.43 , now re-numbered as (a)(5), retaining the one year period during which a petition is reviewable. This limitation is within the board's broad rulemaking authority and provides the districts with the stability necessary for management and planning. However, the board is also adding (a)(6) to allow the board to waive any reviewability requirement upon good cause shown by a petitioner.

One commenter suggested that paragraph (3) of subsection (a) of §356.43 be keyed to the submission of the desired future condition and not to the availability of the managed available groundwater number. The board agrees with the commenter and is adopting paragraph (3) of subsection (a) of §356.43 with changes to the proposed text and renumbered as paragraph (5). Water Code §38.018(l) describes an appeal of the desired future condition, whereas the managed available groundwater number results from the desired future condition. Therefore it is more logical to connect the petition to the adoption of the desired future condition. There is no mechanism to challenge the managed available groundwater number and the board did not intend to create the impression that the petition process can be used for that purpose. The board adopts §356.43(a) without proposed paragraphs (2) and (3) but with a revision of paragraph (3) now located at paragraph (5).

Two commenters opposed paragraph (4) of subsection (a) of §356.43 which restricted the reviewability of a petition when the issue had been previously reviewed by the districts. Both commenters suggested removing the words "and the districts" from paragraph (4) of subsection (a) of §356.43. One of the commenters noted that, as proposed, this paragraph circumvents the opportunity for a review by the board. The board is making the requested change. Water Code §36.108(l) provides an appeal to ensure that a petitioner has the right to be heard by the board and to provide comments to the districts. An appeal to the board, an entity that was not involved in the adoption of the desired future condition, provides the petitioner a hearing before a disinterested entity. In order to effectuate the right to a board hearing as created by Water Code §36.108, the board deletes the requirement that the issue must have been raised at the district prior to board reviewability. The board notes that, pursuant to §356.43(a)(3), the petitioner must provide the district with the petition 30 days prior to submission and, pursuant to §356.43(d), the district may request a postponement of board review. Both of these requirements provide the districts with a first opportunity to resolve the issue raised by the petitioner.

One commenter requested that the summary of evidence, required by proposed paragraph (5) of subsection (b) of §356.43, be in the form of a sworn statement. The board is not making a change based on this comment because doing so would be redundant. The board is adopting subsection (b) which requires a sworn petition and an affidavit attesting to the truth of the matters contained in the petition. These two requirements are more than sufficient to ensure the seriousness of the petitioner and the validity of the information submitted.

Another commenter questioned whether a petition challenges the districts' approval of the desired future condition or the districts' management policy that established the desired future condition. The statute provides for an appeal of the approval of the desired future condition. However, the board acknowledges that the districts' management policy establishing the desired future condition may be part of a petitioner's challenge. The petitioner may argue that a procedural or substantive flaw in the management policy or process resulted in a desired future condition that is not reasonable. The board prefers to allow a petitioner significant latitude in fashioning his arguments. A petitioner is ultimately required to show that the adopted desired future condition is not reasonable.

In response to the all of the comments relating to the appropriateness of reviewability standards, the board is adopting new paragraph (6) of subsection (a) of §356.43 to provide the board, the districts and petitioners with some flexibility on the timing of filing a petition. Pursuant to adopted paragraph (6), the board may waive any reviewability requirement if the petitioner can show good cause for the requested waiver. This waiver process ensures that the petition will be reviewed when the petitioner can show good cause. The changes provides the districts with some assurance that they can manage and plan according to the adopted desired future condition.

§356.44

The board adopts §356.44, relating to hearing and testimony, with changes to the proposed text. The board has changed the title of the section to "hearing" and has significantly expanded §356.44 by adding subsections (d) through (g) all in response to comments. Adopted subsection (a) relating to hearing on the petition states that the executive administrator shall hold at least one hearing to take testimony. Adopted subsection (b) relating to location of the hearing requires the hearing to be at a central location in the groundwater management area. Adopted subsection (c) relating to notice of hearing requires the board to publish the notice of hearing and to provide it to the petitioner and the respondent. Adopted subsection (d) relating to form of hearing provides that the hearing is not a contested case. Adopted subsection (e) relating to hearing procedure sets out the executive administrator's processes for the hearing. Adopted subsection (f) relating to evidence from other interested persons provides that the hearing record remains open after the public hearing to allow other interested persons to provide evidence for inclusion in the hearing record. Adopted subsection (g) relating to record describes the contents of the hearing record that the board will review. The board has changed the title of §356.44 to hearing. This editorial change is made for clarity and ease of use.

The board received forty-five comments relating to this section. Two commenters stated that the hearing should be a contested case hearing while four commenters stated the hearing should not be a contested case hearing. The board does not consider this hearing a contested case hearing subject to the Texas Administrative Procedure Act, Gov't Code, Chapter 2001. Water

Code §36.108(m) requires a "hearing at a central location in the management area to take testimony on the petition." Water Code §36.108(n), describing the district's hearing on the board's recommendations" uses the term "public hearing." The board interprets the term "hearing" in a manner that gives the board wide discretion in designing and defining the hearing process. However, the board does not have the legal authority to make this hearing a contested case hearing. Current law limits contested case hearings to matters where the legislation requires one. Unless an enabling statute requires a contested case hearing, the agency is not authorized to provide such a hearing. *Best & Co. v. Tex. State Bd. of Plumbing Examiners,* 927 S.W.2d 306 (Tex. App.-Austin 1996, writ denied)

Thirty five commenters recommended that the board add a new subsection (d) to §356.44 stating that the hearing testimony should be from the petitioner, respondent, and other interested persons or entities that would be affected by the petition. The board agrees that proposed §356.44 did not provide sufficient clarity about the role of the respondent district and other affected districts or persons. Therefore, the board adopts §356.44 with changes to the proposed text. New subsection (e), relating to hearing procedure, clarifies that the respondent district is entitled to equal time at the hearing. New subsection (f) provides a method for other interested persons to provide evidence and information relating to the petition. This new subsection responds to the numerous requests that persons and entities, in addition to the petitioner and the respondent districts, should have an opportunity to present evidence to the board. New subsection (f) of §356.44 provides other interested persons who would be affected by the petition the opportunity to submit evidence to the board. The evidence will become part of the hearing record, but the evidence will not be in the form of testimony. This allows full opportunity for other interested persons to provide evidence, but does not make the hearing unreasonably long.

One commenter stated that the board should adopt §356.44 as proposed. The commenter contended that the districts do not need to create any record in addition to the record created at the time they adopted their desired future condition. The board disagrees with this comment. The districts, as respondents in the petition process, should have the opportunity to present any testimony and evidence as they deem appropriate in response to the petition. Just as petitioners should have discretion in presenting their arguments, the districts should have discretion in responding to the petitioners. Additionally, the districts are not generally required to make a "record" of the bases for their substantive decisions; therefore, it is fair to allow them to provide information tailored to rebutting the petitioners contentions.

One commenter recommended that the hearing procedures include evidentiary standards for documents. The board disagrees with this comment because the board interprets Water Code §36.108(m) as requiring a hearing without the legalistic formalities in contested cases. The board does not want to burden the petitioners or the districts unnecessarily. Further, the board expects that the board and board staff can appropriately determine the value of any particular piece of evidence. The historical role of board staff involves processing, analyzing, and weighing scientific and technical information; staff will perform those same functions in the petition process.

One commenter recommended that the rules provide that the board act as a gatekeeper for the introduction of scientific and technical evidence. The board is not making any change based on this comment. As discussed above, the board believes that staff has expertise to separate the wheat from the chaff when evaluating scientific and technical evidence. The board also will have the benefit of information from other interested persons, who can submit written testimony challenging or supporting any scientific or technical evidence presented to the board.

One commenter recommended that the rules require sworn testimony at the hearing. The board agrees with this comment and has added new subsection (e) to §356.44 to detail the hearing procedure. Paragraph (3) of subsection (e) provides that testimony at the hearing shall be sworn. The board acknowledges that certain formalities provide greater confidence in the process, yet the board declines to make the procedures so formal that a potential petitioner may be deterred from using the petition process.

One commenter recommended that the rule provide for cross-examination of persons who testify at the hearing. The board is not making any change based on the comment. In addition to making a hearing much longer, allowing cross-examination makes the hearing too formal and may create the impression that a petitioner must have a trial lawyer available in order to file a petition. Board staff can meaningfully weigh the evidence and testimony without cross-examination.

One commenter requested that the hearing record be transcribed. The board is not making a change based on this comment. The contents of the record must be clear, but requiring a transcript greatly increases the expense of the hearing. The board will make and maintain a tape recording of the testimony at the hearing. In response to this comment and other comments requesting a better definition of the "record," the board adopts new subsection (g) of §356.44 to clearly identify the contents of the record the board will rely upon in its consideration of the petition.

§356.45

The board adopts §356.45 relating to board evaluation, consideration and deliberation with changes to the proposed text. The board has re-organized the subsections in the adopted rule by eliminating one subsection. Proposed subsection (c) of §356.45 related to the contents of the record. The substance of that proposed subsection is now contained in adopted §356.44(g). Therefore, adopted §356.45 contains three subsections: (a) relating to the responsibilities of the executive administrator; (b) relating to agreements reached prior to the board's determination; and (c) relating to the criteria the board shall use in determining reasonableness.

Two commenters recommended that the board should make the use of the criteria listed in §356.45(c) mandatory by changing the word "may" to "shall" when introducing the criteria the board uses to evaluate reasonableness. The board agrees with these commenters and is changing the word "may" to "shall." This change provides the petitioners and the districts with more certainty about the standards for judging the reasonableness of adopted desired future conditions. Additionally, the hearing evidence can be more focused when the petitioner and respondent know what criteria the board will actually use when evaluating reasonableness. The board retains the criteria "any other information relevant to the specific condition" in paragraph (7) of subsection (c) to ensure that the board can consider a legitimate technically sound petition raising issues that are not appropriately evaluated under the listed criteria will be considered fairly. Finally, the board recognizes that due to the hydrogeological complexity and the distinct differences among aquifers, it

may be necessary, when evaluating a petition, to use criteria not previously specified.

The board received six comments relating to the criteria for evaluating the reasonableness of desired future conditions in proposed subsection (d) of §356.45. Five of these commenters suggested additional criteria. Specifically, they requested additional criteria relating to private property rights, the amount of groundwater available for production, consistency with the state water plan, encouragement of reasonable and prudent development of the state's resources, including the future needs of municipal utilities, and preservation of key environmental features and conditions. The board agrees that additional criteria are appropriate and therefore adopts some additional criteria for use in determining reasonableness. The criteria added to subsection (d) of §365.45 are: "impact on private property rights" and "the reasonable and prudent development of the state's groundwater resources."

The board is adding the "impact on private property rights" as a criterion to evaluate the reasonableness of a desired future condition because groundwater is part of the surface estate owned by private parties. The board is adding this criterion to acknowledge the language of Water Code §36.002 which states that the ownership and rights of the owners of the land and their lessees and assigns are recognized and that the statute should not be construed to deprive or divest owners of those rights. The board also recognizes that districts have the legal authority to limit or alter ownership of groundwater rights pursuant to the powers conferred upon them in Water Code, Chapter 36.

The board is also adding "reasonable and prudent development of the state's resources" as a criterion because that statement captures the goal of the board's planning efforts which include the regional water planning groups. The board's mission statement calls for the responsible development of the state's water resources and therefore the board believes this criterion is relevant and important.

The board is not adding a criterion relating to consistency of the desired future conditions with the state water plan because the districts' desired future conditions will become part of the state water plan; therefore such a criterion is not relevant at this time.

The board is not incorporating a criterion relating to the amount of groundwater available for production because the concepts of availability and recoverability are no longer contained in Water Code provisions related to groundwater planning. Additionally, districts are not required to provide information related to availability or recoverability. The board does not want to burden the districts with requests for information about recoverability or availability simply for the purposes of hearing when that kind of information is not something that districts are required to have available.

The board is not incorporating additional criteria relating to environmental protection because that criterion is in adopted paragraph (3) of subsection (a) in language that is sufficiently broad to incorporate the commenter's concerns.

The board is not incorporating a criterion relating to municipal utilities because the board will consider all groundwater use pursuant to paragraph (1) of subsection (c) and a specific listing of all the types of uses is redundant. One commenter recommended that the board list the type and amount of use. The board declines to make changes based on this comment because the board recognizes the condition of an aquifer is related to all potential and actual uses. The listing of certain users or uses is necessary or helpful when devising criteria for measuring "reasonableness."

One commenter suggested that the districts' adopted desired future condition be suspended during an appeal of the reasonableness of the condition and, further, that the rules should contain a mechanism for modification and revision of the desired future condition. The board is not making a change based on this comment. The mechanism for the modification or revision of a desired future condition is already contained in §356.46, which provides that the districts shall present revisions of the desired future condition to the board for review after a public hearing. The suspension of a desired future condition is unnecessary since the districts whose desired future condition is challenged know that the result of the process may be a revised desired future condition; therefore, the districts may adapt to that possibility in a manner based on their judgment and discretion. Finally, the board does not believe that suspension of the desired future condition serves the public interest because district business and policy decisions that derive from or are related to the desired future condition should not be disrupted due to the filing of a petition.

One commenter requested that the word "only" be inserted into the introductory language of subsection (c) of §356.45. The commenter noted that the evaluation criteria were too unclear and that the board should be limited to the criteria specifically listed. The board is not making a change based on this comment. The other revisions to subsection (c) of §356.45 alleviate the concerns expressed by this commenter. Additionally some flexibility is required in the evaluation criteria because of the variety of issues that could be raised in a reasonableness challenge and because of the unique characteristics of particular groundwater formations. Therefore, the board is adopting subsection (c) of §356.45 with additional criteria and with the words, "any other information relevant to the specific desired future condition" in paragraph (7) of subsection (c) of adopted §356.45.

§356.46

The board adopts §356.46 relating to, Board Findings and Public Hearing on Recommended Revisions, with changes to the proposed text. The board, in response to comments and for ease of use, rearranged this section and renamed it. This new title more accurately reflects the contents of the rule. Additionally this section now contains subsections (a) through (g).

Adopted subsection (a) relates to the board's report after hearing. Adopted subsection (b) relates to the respondents' responsibility for preparing revised desired future conditions in accordance with the board's recommendations. Adopted subsection (c) relates to the respondents' opportunity to submit their revised desired future conditions to the board prior to public hearing. Adopted subsection (d) relates to respondents' required public hearing. Adopted subsection (e) relates to respondents' consideration of comments received at the public hearing. Adopted subsection (f) relates to the board's public notice of the respondents' revisions. Adopted subsection (g) relates to the executive administrator's duty to provide the managed available groundwater.

The board received eighty-three comments relating to this section. Seventy-nine of the comments concerned the board's proposed subsections (c) and (d). Twenty-five (25) of the commenters contended that the board's subsections (c) and (d) of §356.46 indicated an attempt to institute state control over groundwater. Thirty-eight (38) of the commenters rec-

ommended alternative language for subsections (c) and (d) of §356.46. The commenters recommended that the board strike the words "as necessary that reflect substantially the recommendations of the board" where those words reference the revisions made by districts after the public hearing on the board's recommended revisions to the desired future conditions. The same commenters also recommended deleting the words "final" and "and approval" from subsection (c). These commenters also suggested that subsection (d) of §356.46 be revised by deleting the words "and approved" in reference to the revisions made by the districts after public hearing. The board is making changes to the proposed text based on these comments.

§356.46(a)

One commenter asked the board to describe the legal significance of the word "recommended." The board is not making changes to proposed subsection (a) of §356.46 based on this comment. The word "recommended," as used in these rules, has its ordinary meaning, i.e. presented as worthy of acceptance. The board recommendations, based on evidence presented at the hearing, will be revisions the board deems worthy of acceptance by the districts. However, the board has revised this section to clarify that a report from the board is required only when the board finds that the conditions require revision as stated in Water Code §36.108(m).

§356.46(b)

One commenter stated that the board should delete the words "according to" as they refer to the revisions made pursuant to the board's recommendations. The board disagrees with this comment because Water Code §36.108(n) states that the districts "shall prepare a revised plan, in accordance with development board recommendations." Another commenter noted that the statute discusses a revised plan while the recommended revisions refer to the desired future conditions; the commenter suggested that the plan means the conditions. The board agrees with the commenter. To the extent the adopted desired future conditions are part of a district's management plan, a revision of the conditions is a revision of the plan. The board has revised subsection (b) to clarify the sequence of the process described under Water Code §38.108(m) and (n).

§356.46(c)

Seventy-nine commenters stated that proposed subsection (c) of §356.46 exceeded the board's legal authority, while four commenters stated that proposed subsection (c) of §356.46 was an appropriate exercise of the board's authority. Twenty four commenters stated that proposed subsection (c) of §356.46 eviscerates local control of groundwater resources and substitutes state control. Forty-three commenters recommended that the board delete the words "that substantially reflect the recommendations of the board," and "and approval" from proposed subsection (c) of §356.46. In response to these comments, the board is adopting §356.46 without the words "and approval" for the reasons stated below.

First, the petition process must have a meaningful outcome if the evidence presented does show that the desired future condition is not reasonable. If a district could revise the desired future conditions in a manner that did not include the board recommendations, then the entire petition process would have been for naught. The board's recommendations and the districts' subsequent revisions are designed to provide a change in the desired future conditions that are the object of a petition. The board's role is to provide an objective review of local decisions that have statewide impacts. To ensure that the petition process is not an exercise in futility, the board adopts new subsections (c), (d), (e) and (f) with changes to the proposed text.

Second, the board's recommended revisions are, in a way, the remedy for the petitioner who presents evidence that convinces the board that the districts' desired future condition is not reasonable. Water Code §36.018(n) clearly requires a district to revise the plan "in accordance with" the board's recommendations. Thus, the board is amending §356.46 by renumbering the subsections and adding a new subsection (c) which requires the districts to provide the board with a copy of the revised desired future condition prior to the public hearing required by Water Code §36.108(n). This requirement will provide an assurance to the petitioner and to the board that the districts are following the process set out in the statute. Additionally, new subsection (c) provides the districts with an opportunity to request a board opinion relating to the revisions to ensure they are in accordance with the board's comments prior to the public hearing. The statute requires that the revisions be made "in accordance with the board's recommendations," not in accordance with the district's interpretation of the board's recommendations.

The board received forty-three comments stating the districts must consider public comment prior to submitting the revised desired future condition to the board under Water Code §36.108(n). The board agrees that the districts must consider and respond to public comments and is adopting §356.46 with changes to the proposed text. In response to these comments, the board adds new subsection (d) to clarify the purpose of the hearing, and to require public notice of the recommended revisions so the public has a meaningful opportunity to comment on the revisions prepared in accordance with the board's recommendations. Additionally, to ensure a meaningful response to the board's recommendations and to the public comments, new adopted subsection (d) of §356.46 requires districts to include the rationale for their revised desired future conditions as submitted to the board after public hearing. The board makes this change to ensure that the petition process, the board recommendations and the public comments are meaningful. The board understands and appreciates that the districts must be responsive to the public comments, and therefore believes that the public will have greater confidence in the public hearing process if the districts are required to show the nexus between their revised desired future conditions and the comments received from the public and from the board. The statute specifically states that the districts shall consider "all public and development board comments." Thus, the requirement that a district provide a rationale for the changes I consistent with made the statutory command to consider all comments. This rule revision is contained in subsection (e) of §356.46 as adopted.

The board also adds new subsection (f) to §356.46 to provide notice to the districts and the public that the board may provide a public response to the revised conditions submitted to the board after the public hearing. Although the board has the authority to provide a public response without so stating in a rule, this new subsection provides notice to all interested persons that the board may choose to make a public response.

The following entity favored the adoption of the proposed rules. Goliad Sands, Ltd.

The following sixty-four entities opposed the adoption of the proposed rules. Brazos Valley Water Alliance, L.P.; Central Texas Groundwater Conservation District; Environmental De-

fense / National Wildlife Federation / Lone Star Chapter of the Sierra Club; Mesa Water; Post Oak Savannah Groundwater Conservation District; Barton Springs-Edwards Aquifer Conservation District; Bee Groundwater Conservation District; Blanco-Pedernales Groundwater Conservation District; Bluebonnet Groundwater Conservation District; Brazos Valley Groundwater Conservation District; City of Bryan; City of College Station; Clearwater Underground Water Conservation District; Coastal Bend Groundwater Conservation District; Cow Creek Groundwater Conservation District; Crockett County Groundwater Conservation District; State Senate, District 24; State Senate, District 28; State Rep., District 17; State Rep., District 74; State Rep., District 87; Fayette County Groundwater Conservation District; Goliad County Groundwater Conservation District; Gonzales County Underground Water Conservation District; Harris-Galveston Subsidence District (also on behalf of the Fort Bend Subsidence District); Headwaters Groundwater Conservation District; Hemphill Underground Water Conservation District; High Plains Underground Water Conservation District No. 1; Hill Country Underground Water Conservation District; Irion County Water Conservation District; Jeff Davis County Underground Water Conservation District; Kenedy County Groundwater Conservation District; Lavaca County Groundwater Conservation District (unconfirmed); Lipan-Kickapoo Water Conservation District; Live Oak Underground Water Conservation District; Lost Pines Groundwater Conservation District; McMullen Groundwater Conservation District; Mesa Underground Water Conservation District; Mesquite Groundwater Conservation District; North Plains Groundwater Conservation District; Panhandle Groundwater Conservation District; Pineywoods Groundwater Conservation District; Presidio County Underground Water Conservation District; R.W.Harden & Associates, Inc.; Real Edwards Conservation and Reclamation District; Refugio Groundwater Conservation District; Rolling Plains Groundwater Conservation District; San Antonio Water System; South Texas Cattlewomen; Sterling County Water Conservation District; Sutton Country Underground Water Conservation District; Tarrant Regional Water District; Texas A&M University; Texas Alliance of Groundwater Districts; Texas Farm Bureau; Uvalde County Underground Water Conservation District; Victoria County Groundwater Conservation District; Water Protection Association; Water Research Group; WATERTEXAS; Wes-Tex Groundwater Conservation District.

West Texas Regional Groundwater Alliance consisting of Coke County UWCD, Glasscock GCD, Hill Country UWCD, Jeff Davis County UWCD, Lipan-Kickapoo WCD, Menard County UWD, Plateau UWC & SD, Santa Rita UWCD, Sutton County UWCD, Crockett GCD, Hickory UWCD No. 1, Irion County WCD, Kimble County GCD, Lone Wolf GCD, Middle Pecos GCD, Permian Basin GCD, Sterling County UWCD, West-Tex GCD.

SUBCHAPTER A. GROUNDWATER MANAGEMENT PLAN APPROVAL

31 TAC §§356.1 - 356.7, 356.9 - 356.12

Statutory authority: The amendments and new sections are adopted under the authority of Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

§356.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 36, Groundwater Conservation Districts, that are not defined here shall have the meanings provided in Chapter 36.

(1) Administratively complete--A plan is considered administratively complete when it contains the information required by §36.1071(a) and (e) of the Texas Water Code.

(2) Amount of groundwater being used on an annual basis--An estimate of the quantity of groundwater annually withdrawn or flowing from wells in an aquifer for at least the most recent five years that information is available. It may include an estimate of exempt uses.

(3) Adopted state water plan--A water plan developed pursuant to Texas Water Code, §16.051 and which has been adopted by the board.

(4) Artificial recharge--Increased recharge accomplished by the modification of the land surface, streams, or lakes to increase seepage or infiltration rates or by the direct injection of water into the subsurface through wells.

(5) Board--Texas Water Development Board.

(6) Conflict--A situation where the managed available groundwater identified in a management plan or the adopted state water plan is not the managed available groundwater based on the desired future conditions set by the groundwater conservation districts in the groundwater management area.

(7) Conjunctive use issues--Issues relating to the combined use of groundwater and surface water sources that optimize the beneficial characteristics of each source.

(8) Desired future conditions--The desired, quantified condition of groundwater resources (such as water levels, water quality, spring flows, or volumes) for a specified aquifer within a management area at a specified time or times in the future, through at least the period that includes the current planning period for the development of regional water plans pursuant to §16.053, Texas Water Code, or in perpetuity, as defined by participating groundwater conservation districts within a groundwater management area as part of the joint planning process. Desired future conditions have to be physically possible, individually and collectively, if different desired future conditions are stated for different geographic areas overlying an aquifer or subdivision of an aquifer.

(9) Discharge--The amount of water that leaves an aquifer by natural or artificial means.

(10) District--Any district or authority created under Texas Constitution, Article III, §52 or Article XVI, §59 that has the authority to regulate the spacing of water wells, the production from water wells, or both.

(11) Estimates--Calculations using best available data and methodologies specified in the management plan such that the quantifications will be reasonable for use by the district and can be tracked over time.

(12) Executive administrator--The executive administrator of the board.

(13) Managed available groundwater--The amount of water that may, to the extent possible, be permitted by a district for beneficial use in accordance with the desired future condition of the aquifer.

(14) Management goals--The qualitative and quantitative ends toward which a district directs its efforts.

(15) Management plan--The groundwater management plan required pursuant to Texas Water Code, §36.1071.

(16) Most efficient use of groundwater--Those practices, techniques and technologies that the district determines will provide the least consumption of groundwater for each type of use balanced with the benefits of using groundwater.

(17) Person with a legally defined interest in groundwater--A person who owns land or groundwater rights in the district, has a legal interest in a well in the district, has authorization from the district to produce groundwater, or otherwise has an interest in groundwater in the district as granted by court order or judgment.

(18) Projected water demand--The quantity of water needed on an annual basis for beneficial use during the period covered by the management plan. The demands shall be projected for the types of use that are included in the state water plan. Each type of use may be subdivided into sub-types by the district.

(19) Recharge--The amount of water that infiltrates to the water table of an aquifer.

(20) Surface water management entities--Political subdivisions as defined by Texas Water Code, Chapter 15, and identified from Texas Commission on Environmental Quality records which are granted authority to store, take, divert, or supply surface water either directly or by contract under Texas Water Code, Chapter 11, for use within the boundaries of a district.

§356.5. Required Content of Management Plan.

(a) A management plan shall contain, unless explained as either not applicable or not cost-effective, the following elements:

(1) management goals:

(A) providing the most efficient use of groundwater;

(B) controlling and preventing waste of groundwater, which may include the waste of groundwater through contamination induced by abandoned oil and gas wells, abandoned water wells, leaking pipelines, and other sources;

(C) controlling and preventing subsidence;

(D) addressing conjunctive surface water management issues;

(E) addressing natural resource issues which impact the use and availability of groundwater, and which are impacted by the use of groundwater;

(F) addressing drought conditions;

(G) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and

(H) addressing, in a quantitative manner, the desired future conditions of the groundwater resources established pursuant to §36.108, Texas Water Code, provided such desired future conditions have been identified at the time the management plan is submitted to the board for approval;

(2) management objectives that the district will use to achieve the management goals in paragraph (1) of this subsection. Management objectives are specific, quantifiable, and time-based statements of desired future accomplishments or outcomes, each linked to a management goal, which set the individual priority for district strategies. Each desired future accomplishment or outcome must be the result of actions that can be taken by district staff or assigns;

(3) performance standards for each management objective. Performance standards are indicators or measures used to evaluate the effectiveness and efficiency of district activities by quantifying the results of actions. Evaluation of the effectiveness of district activities measures the accomplishments of the district. Evaluation of the efficiency of district activities measures how well resources are used to produce an output, such as the amount of resources devoted per unit of accomplishment;

(4) actions, procedures, performance, and avoidance, all specified in as much detail as practicable, including the rules that are necessary to effectuate the management plan. An active and up-to-date website address for any proposed and existing rules may be substituted for the rules portion of this element;

(5) estimates of:

(A) managed available groundwater in the district, based on the desired future condition selected pursuant to §36.108, Texas Water Code, provided that the desired future conditions have been identified at the time the management plan is submitted to the board for approval;

(B) the amount of groundwater being used within the district on an annual basis;

(C) the annual amount of recharge from precipitation, if any, to the groundwater resources within the district;

(D) for each aquifer, the annual volume of water that naturally discharges from the aquifer to springs and any surface water bodies, including lakes, streams, and rivers;

(E) the annual volume of flow into and out of the district within each aquifer and between aquifers in the district, if a groundwater availability model is available;

(F) the projected surface water supply in the district according to the most recently adopted state water plan; and

(G) the projected total demand for water in the district, according to the most recently adopted state water plan;

(6) details of how the district will manage groundwater supplies in the district, including a methodology by which the district will track its progress on an annual basis in achieving its management goals; and

(7) consideration of water supply needs and water management strategies included in the adopted state water plan.

(b) The management goals, performance standards and management objectives required in subsection (a)(1), (2), and (3) of this section must be consistent with the established desired future conditions of the district's groundwater management area. Each district shall use the best available data and information, including its existing groundwater management plan, to make the estimates required in subsection (a)(5) of this section and to develop the plan required by these rules. The district shall use the groundwater availability modeling information provided by the executive administrator in conjunction with any available site-specific information provided by the district to the executive administrator for review and comment before being used in the management plan when developing the estimates required in subsection (a)(5)(C), (D), and (E) of this section.

§356.6. Plan Submittal.

(a) A district requesting approval of its management plan shall submit to the executive administrator the following:

(1) one hard copy and one electronic copy of the adopted management plan;

(2) a certified copy of the district's resolution adopting the plan or an amendment to a plan or other evidence of the district's official action to adopt the plan;

(3) an active and up-to-date website address at which the proposed and any existing rules may be viewed, although a hard copy of such rules may be substituted;

(4) evidence of coordination with all surface water management entities in the district's boundaries; and

(5) evidence that the plan was adopted after notice and hearing.

(b) The plan or revised plan under §356.7 of this title (relating to Approval) shall be considered properly submitted to the board when all of the items specified in subsection (a) of this section are received in the Austin offices of the board. Once a management plan or amendment is properly submitted to the board, the time lines of §356.7 of this title begin.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 3, 2008.

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Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
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Proposal publication date: October 19, 2007
For further information, please call: (512) 463-4946

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31 TAC §§356.11 - 356.13

The repeals are adopted under the authority of Texas Water Code §6.101, which provides the Board with the authority to adopt rules necessary to carry out the powers and duties of the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §356.22

The amendment is adopted under the authority of Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. SUBMITTAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.31 - 356.35

The new sections are adopted under the authority of Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

§356.34. Submission Package.

Districts must include the following when submitting an adopted desired future condition to the board:

(1) the desired future condition of the aquifer in the groundwater management area (multiple desired future conditions for the same aquifer in a groundwater management area need to be physically compatible);

(2) copies of the groundwater management area meeting postings and minutes, with the complete voting record by member, of the groundwater management area's public meetings at which the desired future conditions were adopted;

(3) a resolution signed by the groundwater management area member district representatives adopting the desired future conditions;

(4) the name of a designated representative of the groundwater management area for board staff to contact as necessary; and

(5) any other information the executive administrator or designee may require.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. APPEALING APPROVAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.41 - 356.46

The new sections are adopted under the authority of Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

§356.42. Definitions.

Words and terms used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) Adopted Desired Future Conditions--The desired future conditions, subject to appeal under this subchapter and adopted pursuant to Texas Water Code §36.108.

(2) Districts--The groundwater conservation districts that have adopted desired future conditions pursuant to Texas Water Code §36.108(d).

(3) Evidence--Information, consisting of testimony, written materials, material objects, or in any other form, that is relevant to the reasonableness of the desired future conditions.

(4) Executive Administrator--The executive administrator of the board or his designee.

(5) Petition--A written document, with evidence, submitted to the board and appealing the adoption of a desired future condition by the districts in a groundwater management area.

(6) Petitioner--A person or entity with a legally defined interest in groundwater in the groundwater management area; a district in or adjacent to the groundwater management area; or a regional water planning group for a region in the groundwater management area that appeals the approval of a desired future condition.

(7) Respondent--The groundwater conservation districts in the groundwater management area that adopted the desired future conditions under Texas Water Code §36.108.

§356.43. Petition: Reviewability; Form; Receipt; Postponement; Rebuttal and Joinder.

(a) Reviewability. The board will review a petition when:

(1) the petition conforms to the requirements of this subchapter;

(2) the districts have adopted their desired future conditions;

(3) the petitioner has provided the districts, whose adopted desired future condition is being appealed, with a copy of the petition and supporting evidence that meets the requirements of subsection (b) of this section, at least thirty (30) days prior to filing an appeal with the board;

(4) the substantive issues raised in the petition have not been previously reviewed by the board;

(5) no more than one year has passed since the districts' adoption of the desired future condition; and

(6) the board may, in its discretion, waive any of the requirements of this subsection upon good cause shown by petitioner.

(b) Form and Contents of Petition. A petition shall be addressed to the executive administrator, signed by the petitioner, sworn to before a notary public, and contain the following information:

(1) the petitioner's name and contact information, including mailing address, e-mail address, telephone number, and fax number and, if applicable, the same information for a person or entity designated as a representative of the petitioner; and an affidavit attesting to the truth of the matters contained in the petition;

(2) documents proving the nature of the petitioner's legally defined interest in the groundwater in the area; except that this requirement does not apply to a groundwater district in or adjacent to the groundwater management area or a regional water planning group for a region in the area;

(3) a certified copy of a resolution or other official document describing the extent and nature of the authority of the representative of the petitioner;

(4) a summary of the evidence upon which petitioner relies for his contention that the adopted desired future condition is not reasonable; and

(5) the evidence upon which the petitioner will rely at the hearing.

(c) Receipt of Petition and Acknowledgment. The executive administrator shall provide the petitioner and the respondents within the groundwater management area with written acknowledgment of receipt of a petition within 10 business days.

(d) Respondent's Request for Postponement. A groundwater conservation district or any district in the groundwater management area may, within 10 business days of their receipt of the board's acknowledgment of the receipt of a petition, request that the executive administrator postpone board review of the petition for 60 days to encourage consultation and resolution of the petition. The petition shall be presented to the board no later than 120 days after any postponement granted to the respondent.

(e) Respondent's Rebuttal to Petition. The respondent may, but is not required to, present evidence to the board and the petitioner prior to the hearing.

(f) Joinder of Petitions. The executive administrator may join multiple petitions concerning the same area, aquifers, and issues if such joinder is beneficial to the board, the petitioners, and the respondents.

§356.44. Hearing

(a) Hearing on petition. The executive administrator shall hold at least one hearing to take testimony on the petition from the petitioner and the respondents.

(b) Location of hearing. The hearing shall be conducted at a central location in the groundwater management area.

(c) Notice of the hearing. The notice of hearing shall be published in the Texas Register and shall be provided to the petitioners and the respondents.

(d) Form of hearing. The hearing is not a contested case hearing.

(e) Hearing procedure. The hearing shall generally conform to the procedures in this subsection. The executive administrator has the discretion to adopt different or additional procedures at the hearing upon the joint request of the petitioner and the respondent or on his own initiative. The executive administrator may issue any directives necessary to ensure an orderly, fair, and efficient hearing. The hearing shall proceed as follows:

(1) The executive administrator shall provide a concise statement relating to the scope and purpose of the hearing and shall proceed to take relevant testimony and accept relevant evidence.

(2) The petitioner and the respondent shall be provided an equal amount of time to present evidence.

(3) Testimony shall be sworn by a notary public, certified stenographer, or other appropriate official.

(f) Evidence from other interested persons. The executive administrator shall provide persons affected by the petition the opportunity to provide written evidence in any form after the hearing testimony is completed. The executive administrator shall keep the record of the hearing open for at least (10) ten business days for receipt of evidence from other interested persons.

(g) Record. The board shall evaluate and consider the record which shall consist of:

(1) the petition and the respondent's rebuttal;

(2) the testimony and evidence presented at the hearing;

(3) the written comments submitted by other interested persons;

(4) the list of findings, the summary and analysis of the evidence, and any recommendations prepared by board staff;

(5) the minutes of the board's public deliberation on the petition;

(6) the board's report containing recommended revisions transmitted to the districts; and

(7) any other information relevant to the particular hearing. After the respondent has conducted the public hearing pursuant to §356.46(d) and (e) of this chapter, the final revised desired future conditions and the rationale for the respondent's changes shall be submitted to the board and shall become part of the hearing record.

§356.45. Board Evaluation, Consideration, and Deliberation.

(a) The executive administrator shall prepare a list of findings based on evidence received at the hearing and may also provide a summary, analysis, and recommendations relating to revisions to districts' plans and desired future conditions to the board.

(b) The executive administrator or the board may, at any stage of the process described in this subchapter, terminate the proceedings on a petition when an agreement is reached resolving the petition or a petition has been withdrawn. Any such agreements shall become a part of the record.

(c) The board shall base any recommended revisions to a plan and to the desired future conditions only on evidence in the hearing record. The board shall consider the following criteria when determining whether a desired future condition is reasonable:

(1) the adopted desired future conditions are physically possible and the consideration given groundwater use;

(2) the socio-economic impacts reasonably expected to occur;

(3) the environmental impacts including, but not limited to, impacts to spring flow or other interaction between groundwater and surface water;

(4) the state's policy and legislative directives;

(5) the impact on private property rights;

(6) the reasonable and prudent development of the state's groundwater resources; and

(7) any other information relevant to the specific desired future condition.

§356.46. Board Findings and Public Hearing on Recommended Revisions.

(a) If the board finds that the petitioner has shown that the desired future condition is not reasonable, then the board shall prepare a report that includes a list of findings and recommended revisions to the respondent.

(b) The respondent shall prepare a revised plan and revised desired future conditions in accordance with the board's recommendations.

(c) Prior to the public hearing on the board's recommended revisions, the respondent shall submit their revised desired future conditions to the board. The respondent may, but is not required to, request an opinion regarding whether the respondent's revisions are in accordance with the board's recommendations.

(d) The respondent shall hold a public hearing at a central location in the area. The purpose of the hearing shall be to solicit public comment on the board's recommended revisions. The notice shall include a copy of the proposed recommended revisions. The respondent shall provide a copy of the notice of the public hearing to the board on the day the notice is published.

(e) The respondent shall consider all public and board comments, revise the conditions, and submit the revised conditions to the board for review. The respondent shall provide the board with the rationale, based upon comments received at the hearing, for changes to desired future conditions that vary from the board's recommended revisions. The respondent's rationale shall be part of the hearing record.

(f) The board will provide public notice of the district's revisions submitted to the board and the board may, in its discretion, provide a public response to the district's revised conditions.

(g) The executive administrator shall provide the appropriate districts and regional water planning groups with the managed available groundwater based on the desired future conditions as revised according to the process described in Texas Water Code §36.108 and this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Water Development Board
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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §75.7(a)

Schedule of Fees

	Fee Description	Board Fee	Professional Fee (78th Leg)	Texas Online	Patient Protection	Total Fee
1.	DC Initial Application (includes $50 transcript verification)	$185.00	$200.00	$0.00	$0.00	$385.00
2.	DC Jurisprudence Examination (Repeat Exam)	135.00	200.00	0.00	0.00	335.00
3.	DC Initial License - Prorated	125.00	0.00	0.00	5.00	130.00
4.	DC License Renewal - On Time	135.00	200.00	5.00	1.00	341.00
5.	DC License Renewal - Late under 90 days	202.50	200.00	5.00	1.00	408.50
6.	DC License Renewal - Late 90 days to 1 year	270.00	200.00	5.00	1.00	476.00
7.	DC License Renewal - Late up to 3 Years for Good Cause	Calculated	Calculated	0.00	0.00	Calculated
8.	DC License Reinstatement - Out of State	135.00	200.00	0.00	0.00	335.00
9.	DC License - Put on Inactive Status	None	None	None	None	None
10.	DC License - Reactivate from Inactive Status	135.00	200.00	0.00	0.00	335.00
11.	DC License - Duplicate Copy (Replacement)	25.00	0.00	0.00	0.00	25.00
12.	DC Annual Certificate - Duplicate Copy (Replacement)	10.00	0.00	0.00	0.00	10.00
13.	Facility License - Initial Registration	65.00	0.00	0.00	5.00	70.00
14.	Facility License Renewal - On Time	65.00	0.00	2.00	1.00	68.00
15.	Facility License Renewal - Late under 90 days	115.00	0.00	2.00	1.00	118.00
16.	Facility License Renewal - Late 90 days to one year	165.00	0.00	2.00	1.00	168.00
17.	Facility License - Duplicate Copy (Replacement)	25.00	0.00	0.00	0.00	25.00
18.	Radiologic Technician Initial Registration	35.00	0.00	0.00	0.00	35.00
19.	Radiologic Technician Annual Renewal	35.00	0.00	0.00	1.00	36.00
20.	Continuing Education Course Approval Fee (annual)	25.00	0.00	0.00	0.00	25.00
21.	TBCE Online Jurisprudence CE Course	55.00	0.00	0.00	0.00	55.00
22.	**Application for Approval of Chiropractic Specialty**	**750.00**	**0.00**	**0.00**	**0.00**	**750.00**
23.	**Newsletter Fee - One Year**	**8.00**	**0.00**	**0.00**	**0.00**	**8.00**
24. [~~22~~]	Certification of DC license (to another state board)	25.00	0.00	0.00	0.00	25.00
25. [~~23~~]	Verification of DC license (not certification letter) + postage	2.00	0.00	0.00	0.00	2.00
26. [~~24~~]	Verification of Educational Courses/Grades	50.00	0.00	0.00	0.00	50.00
27. [~~25~~]	Printed copy of Statutes and Rules	10.00	0.00	0.00	0.00	10.00
28. [~~26~~]	Returned Check Fee	25.00	0.00	0.00	0.00	25.00

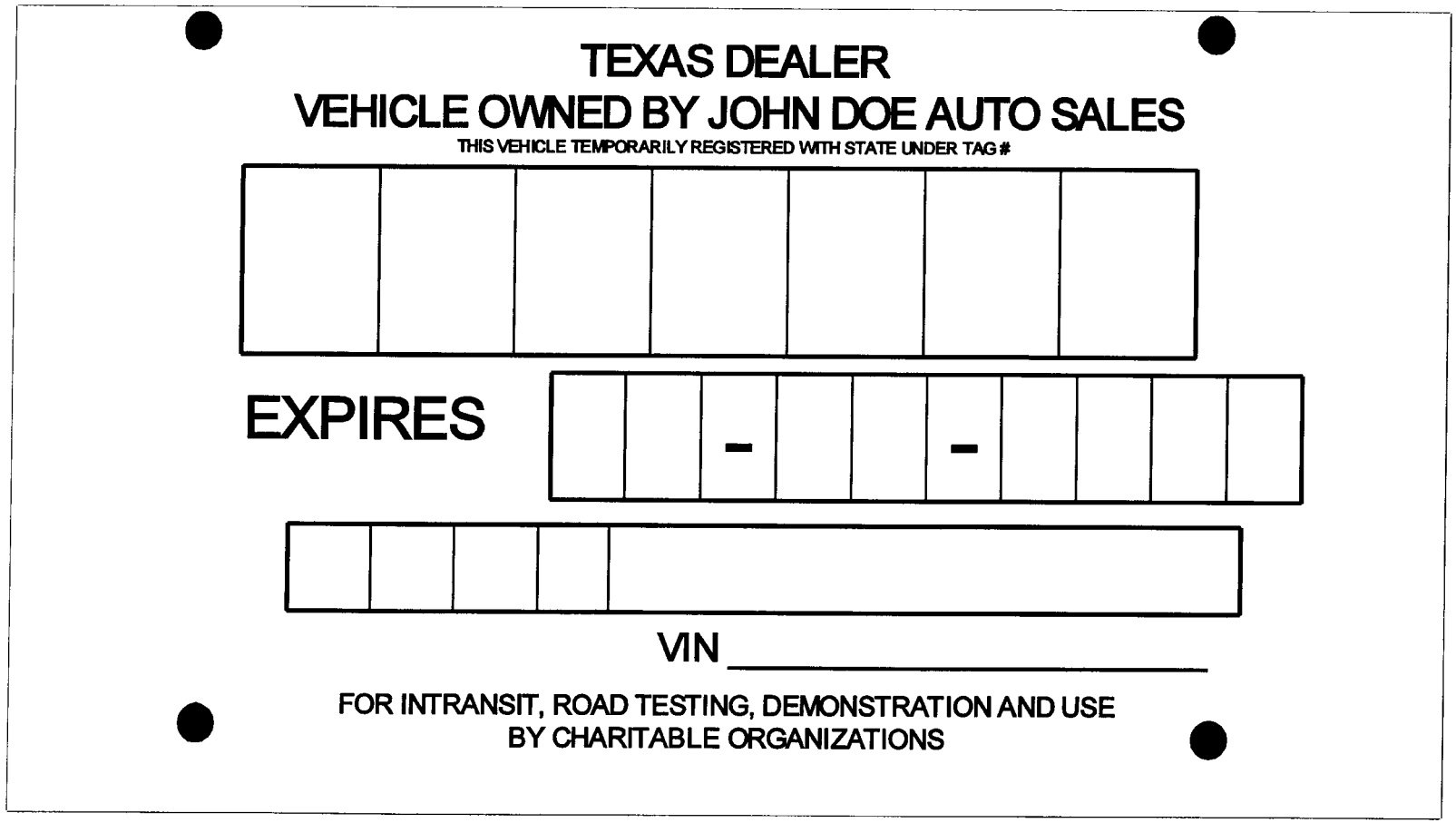
Figure: 22 TAC §153.24(h)

Nature of Violation(s)	Range of Recommended Actions
1st time occurrence--violation(s) of the Act, Rules, and/or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply.	First time violator letter with acknowledgement of violation
1st time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, constitute evidence of a serious but remediable deficiency	First time violator with agreement to take remedial course work and/or adopt preventive policies and procedures and/or administrative penalty of $100 to $500 per violation
1st time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, was done willfully or in a grossly negligent manner	Suspension or revocation and an administrative penalty of $1,000 to $3,000 per violation
2nd time occurrence--violation(s) of the Act, Rules, and/or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply.	Administrative penalty of $250 to $1,000 per violation with agreement to take remedial course work and/or adopt preventive policies and procedures
2nd time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, constitute evidence of a serious but remediable deficiency	Administrative penalty of $500 to $1,500 plus required remedial course work and adoption of preventive policies and procedures
2nd time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, was done willfully or in a grossly negligent manner	Revocation and administrative penalty of $2,000 to $5,000
3rd time occurrence--violation(s) of the Act, Rules, and/or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply.	Administrative penalty of $1,000 to 2,500 with agreement to take remedial class work and/or adopt preventive policies and procedures
3rd time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, constitute evidence of a serious but remediable deficiency	Suspension for up to 180 days or Revocation with agreement to take remedial class work and adopt preventive policies and procedures
3rd time occurrence--violation(s) of the Act, Rules, and/or USPAP that individually or collectively, was done willfully or in a grossly negligent manner	Revocation and administrative penalty of $5,000
Unlicensed activity	Administrative penalty of $1,500 to $5,000

Figure: 40 TAC §19.2112(f)(1)

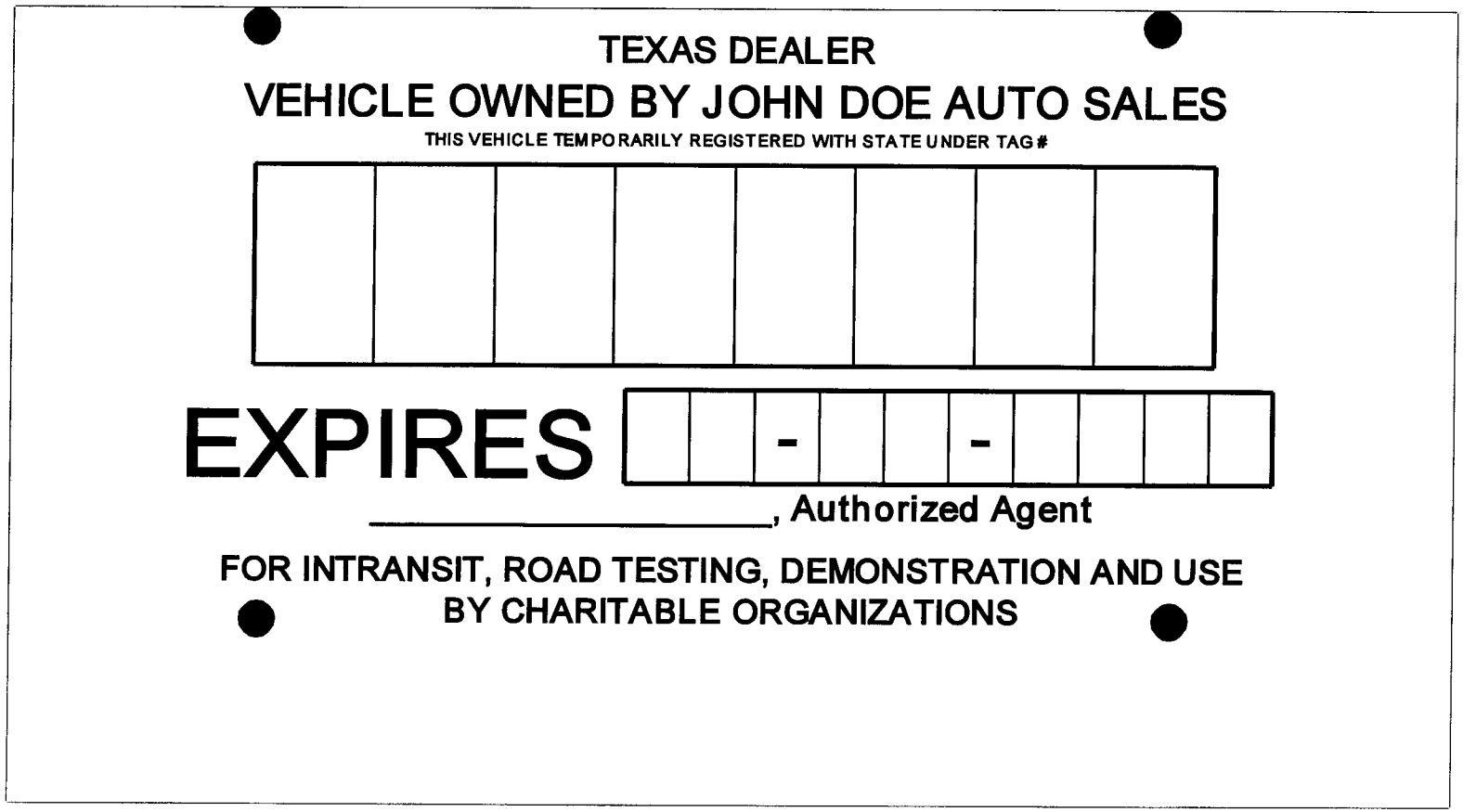
Administrative Penalties Table			
Immediate jeopardy	J $3,000 - 6,000	K $4,000 - 8,000	L $5,000 - 10,000
Actual harm	G $500 - 2,000	H $1,000 - 3,000	I $2,000 - 5,000
No actual harm with a potential for more than minimal harm	D $100 - 600	E $200 - 800	F $400 - 1,000
No actual harm with a potential for minimal harm	A $0	B $0	C $0
	Isolated	Pattern	Widespread

Figure: 43 TAC §8.153(d)(1)
APPENDIX A-1



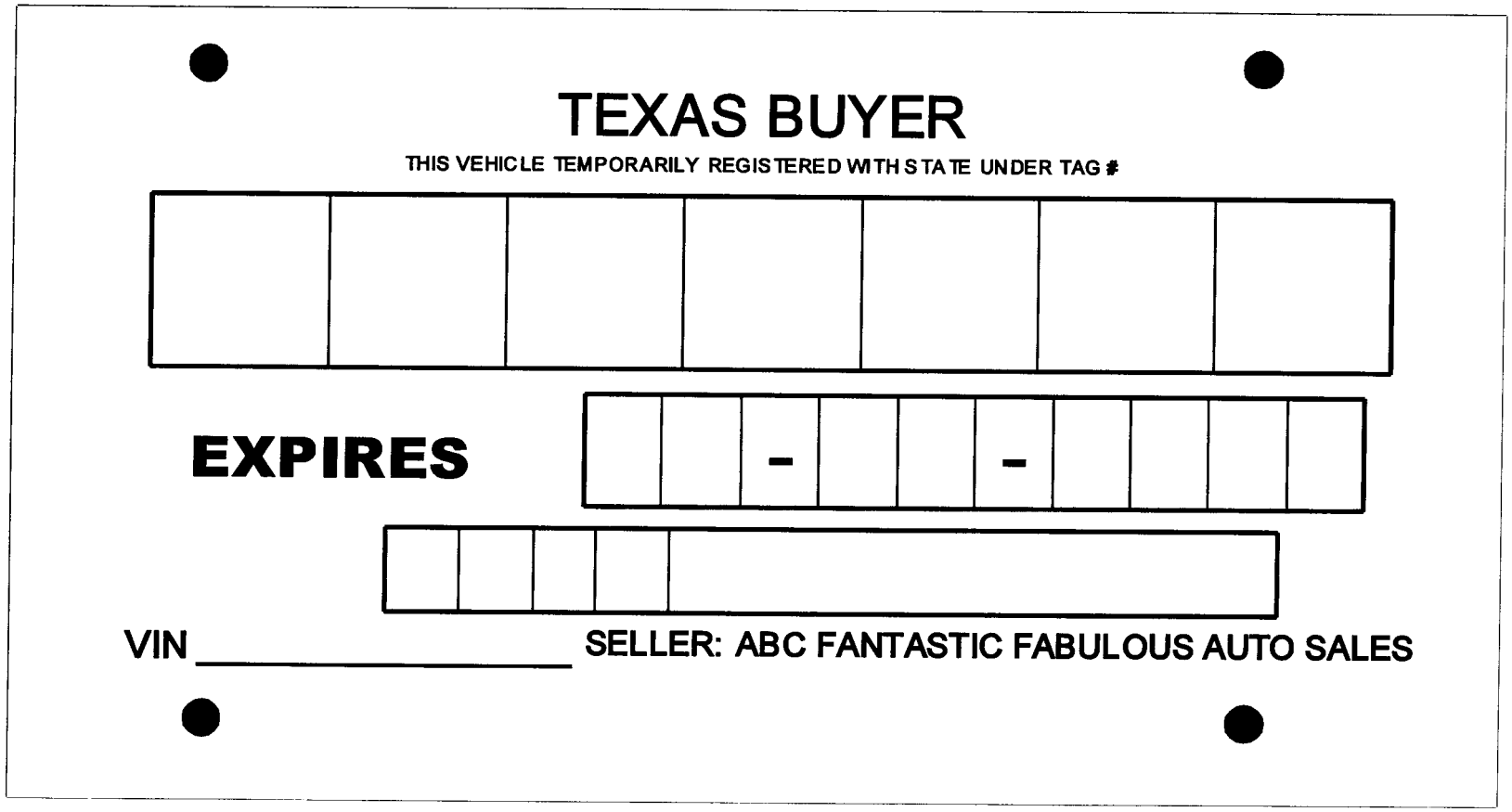
DEALER TAG – ASSIGNED TO SPECIFIC VEHICLE

Figure: 43 TAC §8.153(d)(2)
APPENDIX A-2



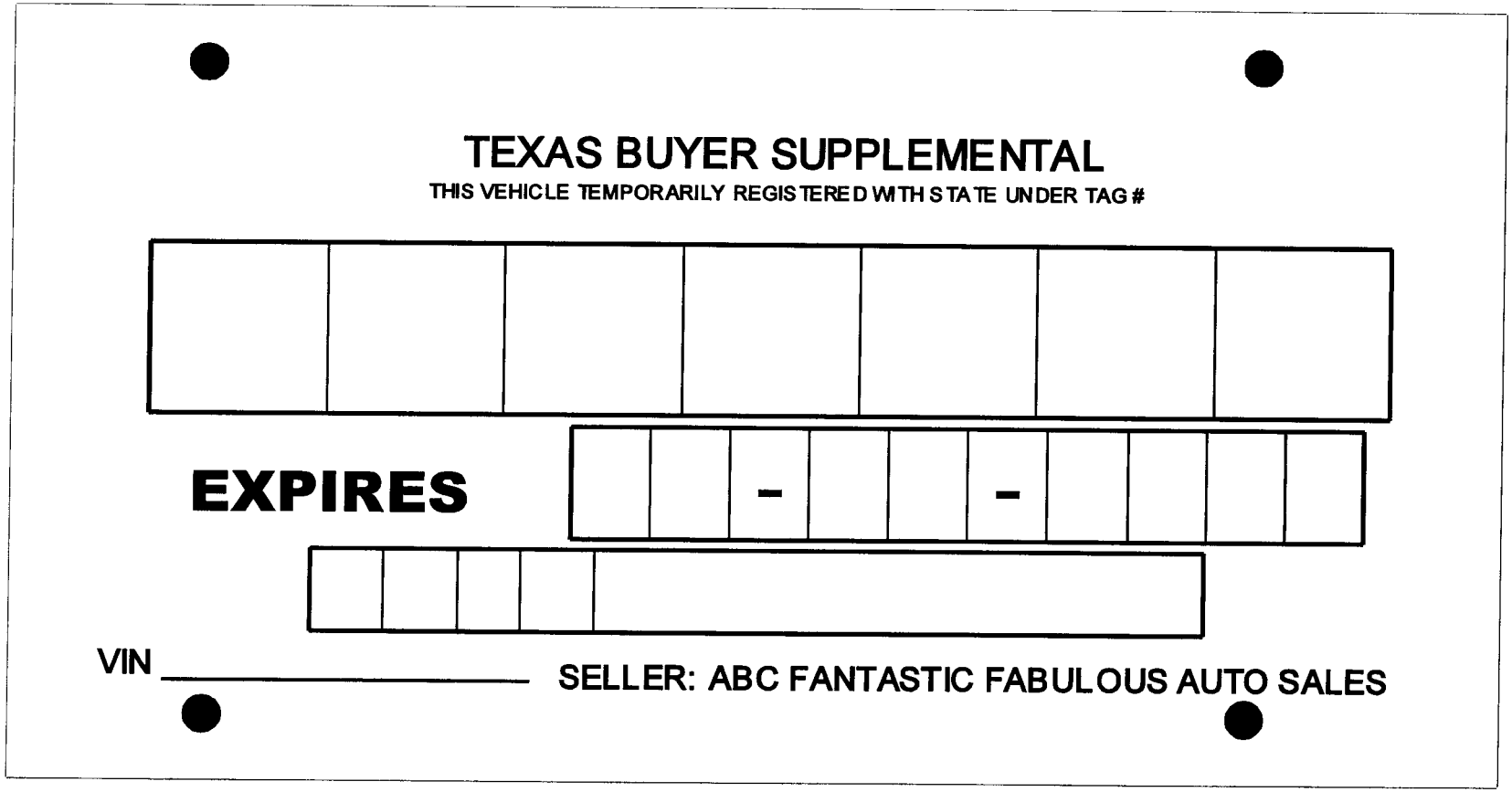
DEALER TAG – ASSIGNED TO SPECIFIC SALESPERSON

Figure: 43 TAC §8.153(d)(3)
APPENDIX B-1



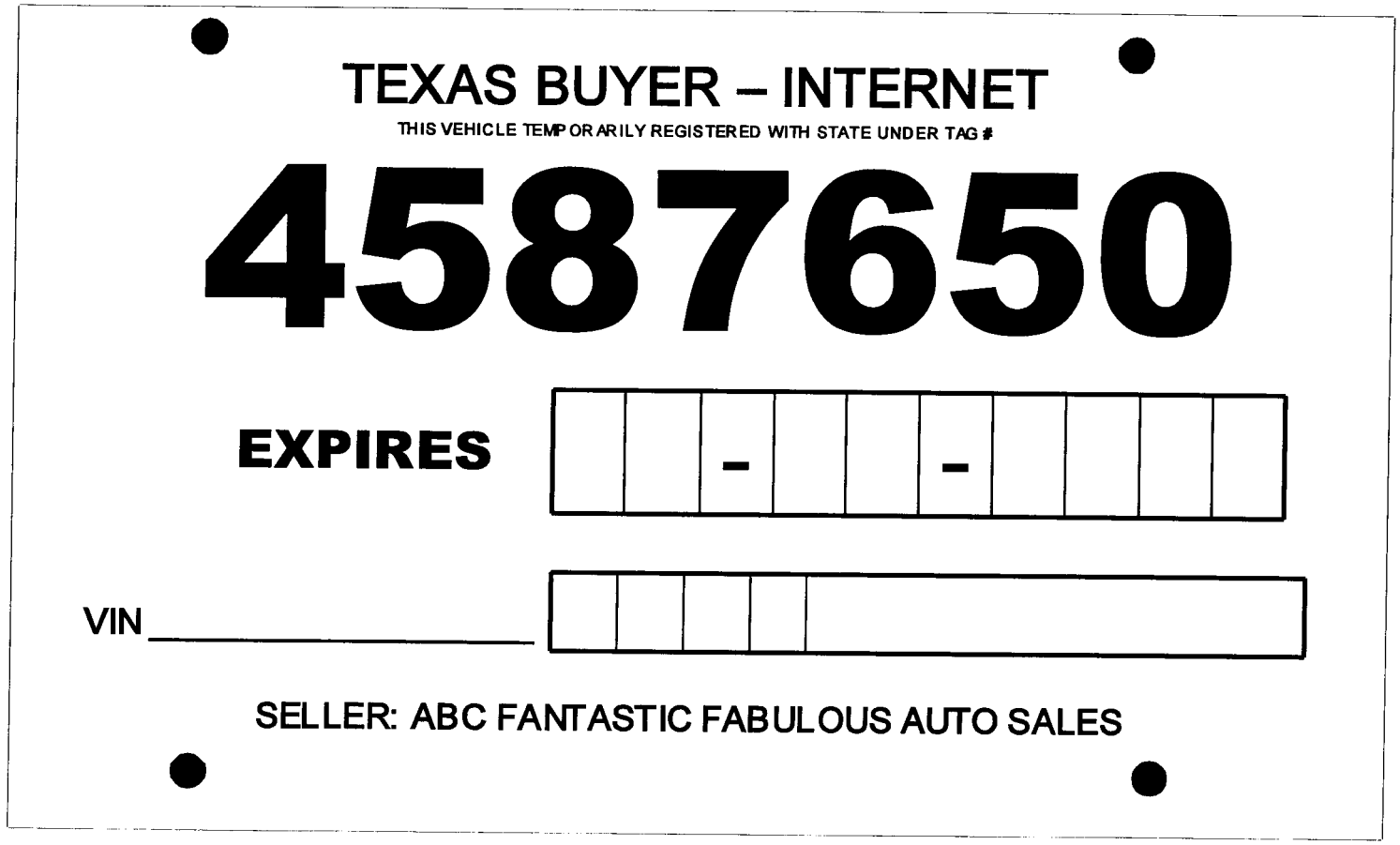
BUYERS TAG - INITIAL

Figure: 43 TAC §8.153(d)(4)
APPENDIX B-2



BUYERS TAG - SUPPLEMENTAL

Figure: 43 TAC §8.153(d)(5)
APPENDIX B-3

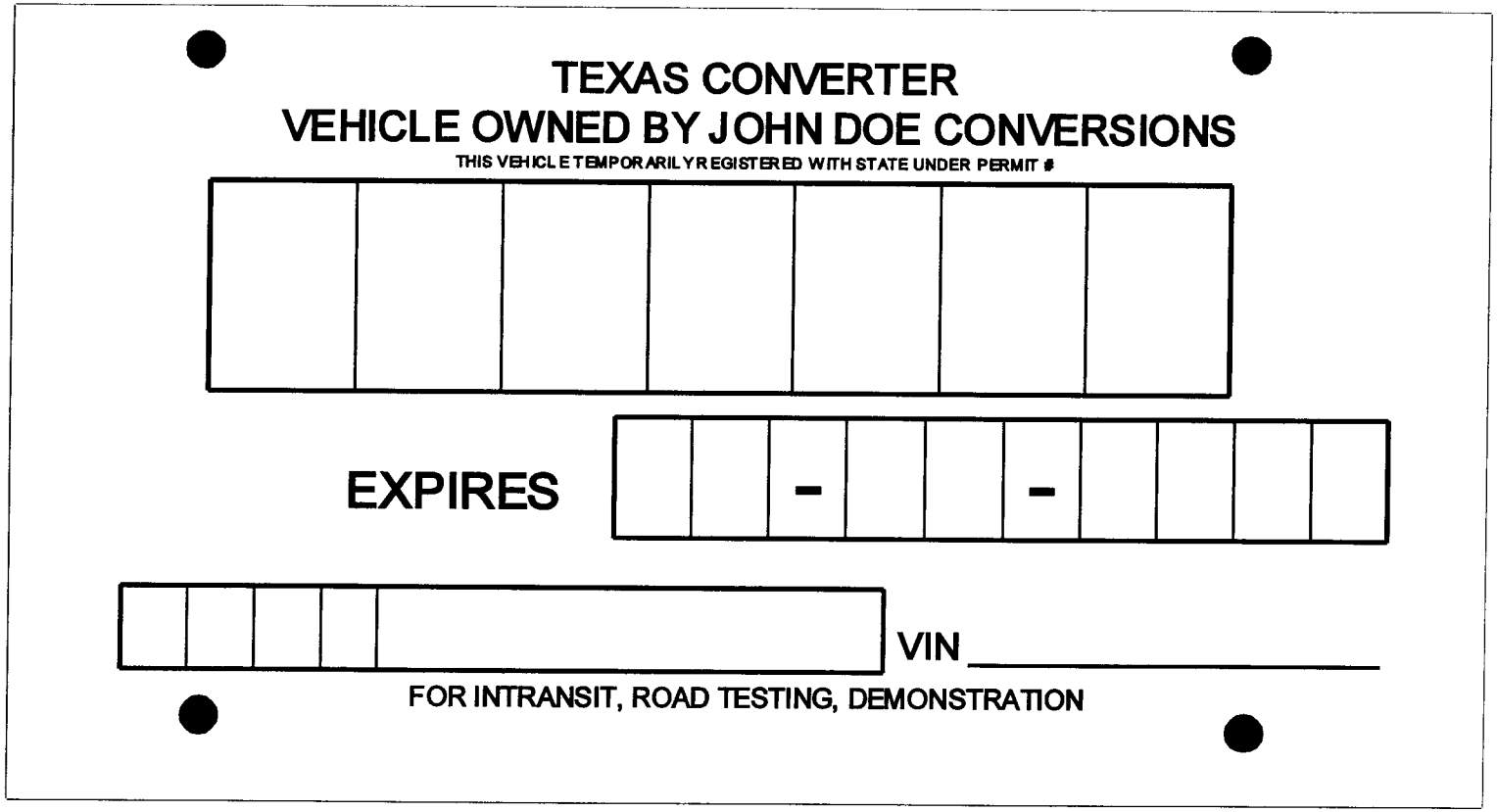


INTERNET DOWN BUYERS TAG

Figure: 43 TAC §8.153(d)(6)
APPENDIX B-4

EMERGENCY STATE BUYERS TAG

Figure: 43 TAC §8.153(d)(7)
APPENDIX C -1



CONVERTERS TAG

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Draft 2008 Annual Action Plan

The Texas State Affordable Housing Corporation presents for public comment its draft 2008 Annual Action Plan, which is a component of the 2008 State of Texas Low Income Housing Plan and Annual Report. A copy of the draft 2008 Annual Action Plan may be found on the Corporation's website at www.tsahc.org. The public comment period for the Corporation's Draft 2008 Annual Action Plan is December 17, 2007 through February 6, 2008.

Written comment may be sent to Katherine Closmann, Executive Vice President, 1005 Congress Ave, Suite 500, Austin, Texas 78701 or by email to kclosmann@tsahc.org.

TRD-200800110
David Long
President
Texas State Affordable Housing Corporation
Filed: January 9, 2008

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of December 28, 2007, through January 3, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on January 9, 2008. The public comment period for this project will close at 5:00 p.m. on February 8, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: De Ayala Properties, L.L.C.; Location: The project is located east of the intersection of Old School Road and State Highway 35 in southeast Aransas County, Texas. The project site is 72 acres; the center of the project location can be located on the U.S.G.S. quadrangle map entitled Estes, Texas at approximate UTM Coordinates: Easting 686816; Northing 3094115. Project Description: The applicant proposes to create a single-family residential canal subdivision with water access to Redfish Bay and the Gulf Intracoastal Waterway (GIWW). To create this development, the applicant is proposing to impact 14.76 acres of non-tidal wetlands by excavating and/or filling those wetlands to accommodate home lots and streets. Additionally, the applicant proposes to connect the canal development to the GIWW by dredging a total of 1.01 acres of tidal Section 10 waters, of which, 0.25 acres is comprised of seagrass beds. The applicant proposes to excavate and/or place fill in 14.76 acres of non-tidal wetlands to construct 141 waterfront lots and five 130-foot-wide canals of varying lengths. Construction involves 15,370 linear feet of bulkhead and excavation of approximately 420,000 cubic yards of material from uplands, wetlands and navigable waters of the United States during the creation of the primary canal, a water circulation canal, and five secondary canals. The excavated material would be placed between the excavated areas to raise the elevation of future home sites. The aforementioned secondary canals would be fed by an 8-foot-deep, 136-foot-wide main canal at the north end of the property. Each of the five feeder canals would be sloped from 6 feet deep at their south end to the 8-foot depth of the main canal. In order to facilitate water circulation, all secondary canals will be connected via box culverts to a 40-foot-wide canal that runs parallel to the south property line and empties into Redfish Bay. At its east end (last 300 feet), the canal would widen to 75 feet wide to accommodate 12 finger piers where the applicant proposes to have a boat docking area. Additionally, the applicant has proposed to excavate a 3-foot-deep and 15-foot-wide by 2,280-foot-long channel to catch stormwater runoff. This channel would be separated from the 40-foot-wide canal by a road along the southern property boundary. The applicant has described this smaller canal as a water quality feature. It would be planted with native wetland vegetation to slow and partially treat the effluent before it flows into Redfish Bay. The subdivision would have two connections to the GIWW that require dredging, one at the main canal and one at the 40-foot-wide circulation canal. Dredging for these canals would involve extending the 8-foot-deep main canal and the 6-foot-deep circulation canal out to the GIWW. This operation would require excavation in approximately 1.01 acres in Section 10 waters. Within those Section 10 waters, there are approximately 0.25 acres of seagrass that would be permanently removed. To compensate for impacts to 14.76 acres of non-tidal wetlands, the applicant proposes to mitigate on-site by avoiding and enhancing a 0.87-acre non-tidal wetland located within a 1.32-acre area and mitigate off-site by restoring 16.26 acres of wetlands located within a previously disturbed 39.72-acre area located west of Port Bay and north of Cape Valero Road. To compensate for proposed impacts to 0.25 acres of seagrass beds to be dredged, the applicant proposes to mitigate on-site at a 3 to 1 ratio by creating 0.76 acres of seagrass beds, 0.22 acres of tidal wetland shelves, and 0.06 acres of breakwater. The applicant completed a Tidal Fringe Hydrogeomorphic Analysis Model (TF-HGM); the data generated by this model indicates that the proposed mitigation plan will exceed the functional value of the impacted wetlands within the first three years post construction. The U.S. Army Corps of Engineers (Corps) has not verified the accuracy of the model. The applicant has proposed to bring a sanitary sewer line from Rockport to service this development and any others along its length that wish to tie in to it. CCC Project No.: 08-0042-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-860 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Tempest Energy Resources; Location: The project is located in Galveston Bay, State Tracts (ST's) 288 and 307, approximately 8.3 miles northeast of Seabrook, in Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Bacliff, Texas. Approximate UTM Coordinates in NAD 27 (meters) for the well and the beginning of the proposed pipeline is: Zone 15; Easting: 314996; Northing: 3267684. Project Description: The applicant proposes to install, operate and maintain structures and equipment necessary for oil and gas drilling, production and transportation activities. This would include the installation of a typical marine barge rig, a 70- by 70-foot production platform and/or a 70- by 30-foot well protector, a 240- by 100- by 3-foot shell, gravel or crushed rock well pad, and a 8-inch pipeline approximately 4,714 feet in length from the proposed ST Well #1 location to an existing Tempest Energy Resources production platform in Galveston ST 307 (Permit 23906). CCC Project No.: 08-0043-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1260 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200800098
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: January 8, 2008

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Comptroller of Public Accounts

Notice of Contract Award

The Texas Treasury Safekeeping Trust Company (Trust Company), by and through the Texas Comptroller of Public Accounts, announces this notice of contract award.

The notice of request for proposals (RFP #178f) was published in the June 15, 2007, issue of the *Texas Register* (32 TexReg 3724).

The successful respondent will provide outside legal services to the Texas Treasury Safekeeping Trust Company.

The contract was awarded to: Vinson & Elkins, LLP, 2801 Via Fortuna, Suite 100, Austin, Texas 78746. The total contract compensation amount shall not exceed $200,000.00.

The initial term of the contract is September 1, 2007 through August 31, 2008. The Texas Treasury Safekeeping Trust Company shall have the right to renew the contract for three (3) additional one-year terms one year at a time, through August 31, 2011.

TRD-200800017
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: January 2, 2008

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Notice of Contract Award

The Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), announces the award of a contract under Request for Proposals (RFP #178d), for Master Trust Custodial services for the Texas Tomorrow Fund.

The Comptroller announces that a contract is awarded to The Northern Trust Company of Chicago, 50 South LaSalle Street, Chicago, Illinois 60603. The term of the contract is December 20, 2007 through August 31, 2012. The Board shall have the right, in its sole discretion, to renew the Contract for up to two (2) additional one (1) year periods, one year (1) at a time. The total amount of the Contract is based in part on a percentage of the total assets managed.

The Request for Proposals was issued on Friday, May 25, 2007. The notice of the Request for Proposals was published in the May 25, 2007, issue of the *Texas Register* (32 TexReg 2895).

TRD-200800087
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: January 7, 2008

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Notice of Contract Award

Pursuant to Chapters 403 and 2305 and Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) State Energy Conservation Office (SECO) announces the following contract awards:

The notice of request for proposals was published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6431) (RFP #180e).

The contractors will provide energy engineering services for the Schools and Local Government Program.

Three contracts were awarded as follows:

1. Estes, McClure and Associates, Inc., 3608 West Way, Tyler, Texas 75703. The total amount of this contract is not to exceed $210,000.00. The term of the contract is January 3, 2008 through December 31, 2008;

2. Energy Systems Associates, Inc., 100 East Main, Suite 201, Round Rock, Texas 78664. The total amount of this contract is not to exceed $230,000.00. The term of the contract is January 3, 2008 through December 31, 2008; and

3. Texas Energy Engineering Services, Inc., 1301 S. Capital of Texas Hwy., #B325, Austin, Texas 78746. The total amount of this contract is not to exceed $160,000.00. The term of the contract is January 3, 2008 through December 31, 2008.

TRD-200800099
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: January 8, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/07/08 - 01/13/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/07/08 - 01/13/08 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 01/01/08 - 01/31/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 01/01/08 - 01/31/08 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200800020
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 3, 2008

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Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/14/08 - 01/20/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/14/08 - 01/20/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200800095
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 8, 2008

♦ ♦ ♦

Texas Commission on Environmental Quality

Enforcement Orders

An agreed order was entered regarding City of Follett, Docket No. 2003-1241-MWD-E on December 20, 2007 assessing $10,560 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Robert C. Nichols, Docket No. 2003-0287-MSW-E on December 20, 2007 assessing $6,650 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Elsa, Docket No. 2004-0026-MWD-E on December 20, 2007 assessing $16,385 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Tuftsun, Inc., Docket No. 2003-0922-PST-E on December 20, 2007 assessing $4,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Datari Corporation dba One Stop Mobil, Docket No. 2003-0389-PST-E on December 20, 2007 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Marlin Gruber, Docket No. 2004-0679-PST-E on December 20, 2007 assessing $4,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Marrice Hampton, Docket No. 2004-1052-MLM-E on December 20, 2007 assessing $17,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding New York Brothers Investments, Inc. dba BKS Beverage, Docket No. 2004-1407-PST-E on December 20, 2007 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Ali Samnani dba City Star Texaco, Docket No. 2004-1634-PST-E on December 20, 2007 assessing $3,330 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Becky Combs, Staff Attorney at (512) 239-6939, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Positive Impact Waste Solutions, LLC, Docket No. 2005-0329-MSW-E on December 20, 2007 assessing $14,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding First Gatesville Venture, Inc. dba Amigos 3, Docket No. 2005-1246-PST-E on December 20, 2007 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brad Allen dba A+ Angus Ranch, Docket No. 2005-1357-AGR-E on December 20, 2007 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SBBQS, Inc., Docket No. 2005-1615-AIR-E on December 20, 2007 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2006-0675-AIR-E on December 20, 2007 assessing $3,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Justin Lannen, Staff Attorney at (817) 588-5927, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding John W. Rice dba JR Used Auto Parts, Docket No. 2006-0686-WQ-E on December 20, 2007 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding James R. Coleman dba Coleman Cleaners, Docket No. 2006-1446-DCL-E on December 20, 2007 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Glenn Klein dba Sunburst Lawn & Landscaping, Docket No. 2006-1695-LII-E on December 20, 2007 assessing $625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Alex L. Cruz, Docket No. 2006-1726-LII-E on December 20, 2007 assessing $625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tracy Chandler, Staff Attorney at (512) 239-0629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jackie Brister dba Barefoot Fishing Camp, Docket No. 2007-0030-PWS-E on December 20, 2007 assessing $1,150 in administrative penalties with $230 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 358, Docket No. 2007-0061-MWD-E on December 20, 2007 assessing $2,900 in administrative penalties with $580 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Megargel, Docket No. 2007-0130-PWS-E on December 20, 2007 assessing $2,473 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Sabinal, Docket No. 2007-0139-MWD-E on December 20, 2007 assessing $11,250 in administrative penalties with $2,250 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Premcor Refining Group Inc., Docket No. 2007-0149-AIR-E on December 20, 2007 assessing $64,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mobil Chemical Company Inc., Docket No. 2007-0259-AIR-E on December 20, 2007 assessing $40,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Midway, Docket No. 2007-0318-MWD-E on December 20, 2007 assessing $13,512 in administrative penalties with $2,702 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2007-0322-AIR-E on December 20, 2007 assessing $60,283 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of El Paso, Docket No. 2007-0326-MSW-E on December 20, 2007 assessing $23,100 in administrative penalties with $4,620 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0068, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Reno, Docket No. 2007-0374-MWD-E on December 20, 2007 assessing $4,540 in administrative penalties with $908 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 286, Docket No. 2007-0568-MWD-E on December 20, 2007 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding F. D. Gavranovic, Docket No. 2007-0617-PST-E on December 20, 2007 assessing $8,500 in administrative penalties with $1,700 deferred.

Information concerning any aspect of this order may be obtained by contacting Shontay Wilcher, Enforcement Coordinator at (512) 239-2136, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Pipeline Company LP, Docket No. 2007-0620-AIR-E on December 20, 2007 assessing $7,735 in administrative penalties with $1,547 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Olney Construction Company, Inc., Docket No. 2007-0650-WQ-E on December 20, 2007 assessing $800 in administrative penalties with $160 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Westmoreland Coal Co., Docket No. 2007-0660-IWD-E on December 20, 2007 assessing $10,625 in administrative penalties with $2,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hull Fresh Water Supply District, Docket No. 2007-0664-MWD-E on December 20, 2007 assessing $22,425 in administrative penalties with $4,485 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sparta Oaks Water Corporation, Docket No. 2007-0669-PWS-E on December 20, 2007 assessing $787 in administrative penalties with $157 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Barnett, Enforcement Coordinator at (512) 239-6686, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2007-0672-AIR-E on December 20, 2007 assessing $70,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shin-Etsu Silicones of America, Inc., Docket No. 2007-0675-IWD-E on December 20, 2007 assessing $10,650 in administrative penalties with $2,130 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Corinth, Docket No. 2007-0684-WQ-E on December 20, 2007 assessing $3,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eastman Chemical Company, Docket No. 2007-0699-AIR-E on December 20, 2007 assessing $31,964 in administrative penalties with $6,392 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Red River Redevelopment Authority, Docket No. 2007-0711-PWS-E on December 20, 2007 assessing $2,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2007-0716-MWD-E on December 20, 2007 assessing $3,660 in administrative penalties with $732 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aqua Development, Inc., Docket No. 2007-0726-MWD-E on December 20, 2007 assessing $2,910 in administrative penalties with $582 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2007-0729-IWD-E on December 20, 2007 assessing $2,880 in administrative penalties with $576 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Julie Ann Thames dba Primrose Mobile Home Park, Docket No. 2007-0731-WQ-E on December 20, 2007 assessing $6,500 in administrative penalties with $1,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lucite International, Inc., Docket No. 2007-0750-AIR-E on December 20, 2007 assessing $3,050 in administrative penalties with $610 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Nguyen and Thanh Mai Chau dba Handi Plus 47, Docket No. 2007-0751-PWS-E on December 20, 2007 assessing $994 in administrative penalties with $198 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KM Liquids Terminals, L.P., Docket No. 2007-0754-AIR-E on December 20, 2007 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jessica Rhodes, Enforcement Coordinator at (512) 239-2879, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding El Dorado Utility District, Docket No. 2007-0758-MWD-E on December 20, 2007 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Post Oak Development of Texas, Inc., Docket No. 2007-0762-PWS-E on December 20, 2007 assessing $744 in administrative penalties with $148 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 490-3096, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Edcouch, Docket No. 2007-0764-MSW-E on December 20, 2007 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Kingsville, Docket No. 2007-0765-WQ-E on December 20, 2007 assessing $3,440 in administrative penalties with $688 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southwestern Public Service Company, Docket No. 2007-0769-IWD-E on December 20, 2007 assessing $4,320 in administrative penalties with $864 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Priten Y. Patel dba Easy Stop, Docket No. 2007-0776-PST-E on December 20, 2007 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Stone Mill Homes, Inc., Docket No. 2007-0783-WQ-E on December 20, 2007 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2007-0786-MWD-E on December 20, 2007 assessing $14,365 in administrative penalties with $2,873 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trigeant, Ltd., Docket No. 2007-0806-IWD-E on December 20, 2007 assessing $2,220 in administrative penalties with $444 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Trinity Bay Conservation District, Docket No. 2007-0822-MWD-E on December 20, 2007 assessing $18,400 in administrative penalties with $3,680 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Town & Country Food Stores, Inc. dba Town & Country 271, Docket No. 2007-0887-PST-E on December 20, 2007 assessing $8,550 in administrative penalties with $1,710 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kwik-Kopy Corporation, Docket No. 2007-0890-MWD-E on December 20, 2007 assessing $1,270 in administrative penalties with $254 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Galveston County Water Control and Improvement District 19, Docket No. 2007-0896-PWS-E on December 20, 2007 assessing $770 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Richard Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Parkside at Mayfield Ranch, Ltd., Docket No. 2007-0897-EAQ-E on December 20, 2007 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding F.A. Nunnelly Company, Docket No. 2007-0912-MLM-E on December 20, 2007 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding K.A.T. Excavation & Construction Inc., Docket No. 2007-0925-AIR-E on December 20, 2007 assessing $2,175 in administrative penalties with $435 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gray Utility Service L.L.C., Docket No. 2007-0945-PWS-E on December 20, 2007 assessing $745 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Thomas Barnett, Enforcement Coordinator at (512) 239-6686, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Temple, Docket No. 2007-0971-WQ-E on December 20, 2007 assessing $6,300 in administrative penalties with $1,260 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pringka Corporation dba Speedys Food Store, Docket No. 2007-0986-PST-E on December 20, 2007 assessing $2,550 in administrative penalties with $510 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Frontera Truck Parts & Equipment, Inc., Docket No. 2007-0989-WQ-E on December 20, 2007 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tesco Industries, L.P., Docket No. 2007-1003-AIR-E on December 20, 2007 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mestena Uranium, L.L.C., Docket No. 2007-1010-UIC-E on December 20, 2007 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Cynthia McKaughan, Enforcement Coordinator at (512) 239-0735, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Iola Independent School District, Docket No. 2007-1074-PWS-E on December 20, 2007 assessing $925 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (210) 403-4033, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2007-1220-AIR-E on December 20, 2007 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding St. Mary's University, Docket No. 2007-1236-PST-E on December 20, 2007 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding James E. Lyles, Docket No. 2007-1397-WOC-E on December 20, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Ronald Ray Cooper, Docket No. 2007-1363-WOC-E on December 20, 2007 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Conrad G. Walton dba Holiday Oaks Subdivision, Docket No. 2007-0763-PWS-E on December 20, 2007 assessing $4,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (210) 403-4033, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Gilbert Carrillo, Docket No. 2005-0419-MLM-E on January 4, 2008 assessing $24,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200800113

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: January 9, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of December 6, 2007 through December 27, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF BRACKETTVILLE AND FORT CLARK MUNICIPAL UTILITY DISTRICT has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ10194-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 60 acres. The facility is located approximately 2.3 miles south of the intersection of U.S. Highway 90 and State Highway 131 and 0.75 mile west of State Highway 131 in Kinney County, Texas.

GRAYFORD REX AUTEN has applied for a new permit, Proposed Permit No. WQ0014822001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 900 gallons per day via non-public access low pressure dosing drainfields with a minimum area of 0.21 acres. The wastewater treatment facility and disposal site are located 1,300 feet southwest of the intersection of State Highway 22 and Farm-to-Market Road 2960 in Hill County, Texas. The wastewater treatment facility and disposal site are located in the drainage basin of Iron Creek in Segment No. 1257 of the Brazos River Basin.

H&K JOLLY LLC has applied for a renewal of Permit No. WQ0014417001, which authorizes the disposal of treated domestic wastewater effluent at a daily average flow not to exceed 17,400 gallons per day via surface irrigation of 5 acres of nonpublic access land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located on the northwest corner of the intersection of Farm-to-Market Road 2393 and U.S. Highway 287 in Clay County, Texas.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the TPDES permit No. WQ0013564001 issued to HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 304, to authorize an update of the expiration date of the permit issued October 15, 2007 from December 1, 2007 to December 1, 2011 and to update the discharge route on page 1 of the existing permit to match the discharge route in the water quality standards team memorandum dated June 8, 2007. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 650,000 gallons per day. The facility is located 2.0 miles southeast of the intersection of Stuebner-Airline Road and Farm-to-Market Road 1960 in Harris County, Texas.

HEISER HOLLOW WATER RECLAMATION LLC AND HEISER HOLLOW PARTNERS LLC has applied to the TCEQ for a new permit, Proposed Permit No. WQ0014806001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day via a public access subsurface drip irrigation system with a minimum area of 46 acres. This permit will not authorize a discharge of pollutants into waters in the State. TCEQ received this application on May 14, 2007. The Heiser Hollow Wastewater Treatment Facility and disposal site will be located 0.9 miles east-northeast of the intersection of Farm-to-Market Roads 306 and 2673 in Comal County, Texas.

MCLENNAN COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 2 has applied for a major amendment of TPDES Permit No. WQ0010344001, to add a flow equalization basin to the headworks of the existing wastewater treatment facility. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility is located approximately 1,500 feet southeast of Farm-to-Market Road 308 and approximately 4,000 feet east-northeast of the intersection of Interstate Highway 35 and Farm-to-Market Road 308 in McLennan County, Texas.

MEADOWWHILL REGIONAL MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011215001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,400,000 gallons per day. The facility is located at 23102 Roseville Drive, approximately two miles west of the intersection of Interstate Highway 45 and Farm-to-Market Road 2920 in Harris County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied to the TCEQ for a renewal of TPDES Permit No. WQ0012047001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,250,000 gallons per day. The facility is located at 4920 Horizon Road, on the west side of Buffalo Creek and on the south side of Farm-to-Market Road 3097 approximately 1.5 miles northwest of the intersection of Farm-to-Market Roads 3097 and 549 in the City of Rockwall in Rockwall County, Texas.

PRESTONWOOD FOREST UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011089001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day in the final phase. The facility is located at 14210 Prestonwood Forest Drive, approximately 3,100 feet east of the intersection of Cypress Creek and State Highway 249, 9 miles southeast of the City of Tomball in Harris County, Texas.

WAY AUTUMNWOOD LTD has applied for a new permit, proposed TPDES Permit No. WQ0014853001, to authorize the discharge of

treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day. The facility will be located approximately 2.3 miles southwest of the intersection of Hardin Store Road and Farm-to-Market Road 2978, on the north side of Hardin Store Road, east of Mill Creek in Montgomery County, Texas.

If you need more information about these permit applications or the permitting process; please call the TCEQ Office of Public Assistance, toll-free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200800111
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 9, 2008

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Notice of Water Rights Application

Notice issued January 3, 2008.

APPLICATION NO. 12185; The Quanah Country Club, Applicant, P.O. Box 86, Quanah, Texas 79252-0086, has applied for a Water Use Permit to maintain two existing dams and reservoirs, known as North Lake and South Lake, both on an unnamed tributary of Groesbeck Creek for in-place recreational purposes; construct and maintain a tank pond, known as Holding Pond 1, on an unnamed tributary of Spring Creek and use the bed and banks of the pond for storage and subsequent diversion; and construct and maintain a pit pond, known as Holding Pond 2, on an unnamed tributary of Groesbeck Creek for in-place recreational and livestock purposes and use the bed and banks of the pond for storage and subsequent diversion of treated effluent for agricultural (irrigation) purposes, in the Red River Basin, Hardeman County. More information on the application and how to participate in the permitting process is given below. The application was received on April 11, 2007. Additional information and fees were received on June 25, 2007 and August 20, 2007. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on August 31, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200800112
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 9, 2008

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 4, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for the radiological services procedure codes listed below. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rates will be effective March 1, 2008. The proposed rates are as follows:

Type of Service (TOS)*	Procedure Code	Modifier	Description	Proposed Medicaid Rate
4	R0070		Transportation of portable x-ray equipment and personnel to home or nursing home, per trip to facility or location, one patient seen	$148.31
4	R0075		Transportation of portable x-ray equipment and personnel to home or nursing home, per trip to facility or location, more than one patient seen, per patient	
		UN	Two patients served, per patient	$74.16
		UP	Three patients served, per patient	$49.44
		UQ	Four patients served, per patient	$37.08
		UR	Five patients served, per patient	$29.66
		US	Six patients or more served, per patient	$24.72

*Type of Service Code Key: 4 = radiology total component

Methodology and Justification. The proposed payment rates are calculated in accordance with 1 TAC §355.8081 and 1 TAC §355.8085, which address the reimbursement methodology for portable X-ray providers and physicians and certain other practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after January 21, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

TRD-200800090
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: January 8, 2008

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 4, 2008, at 10:00 a.m. to receive public comment on the proposed Medicaid payment rates for procedure codes relating to two physician-administered drugs, Eculizumab and Nelarabine. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate for Eculizumab procedure code C9236, will be retroactively effective October 1, 2007. Claims filed from October 1, 2007, through December 31, 2007, will be reprocessed. The procedure code for Eculizamab will change to J1300 effective January 1, 2008. Claims filed on or after January 1, 2008, will be reprocessed. Both codes will be implemented April 1, 2008.

The proposed payment rate for Nelarabine, procedure code J9261, will be effective February 1, 2008, and implemented February 8, 2008.

Methodology and Justification. The proposed payment rate for the physician-administered drugs were calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners; and the specific fee guidelines published in Section 2 of the 2008 Texas Medicaid Provider Procedures Manual.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after January 18, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400,

Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Procedure Codes and Proposed Payment Rates

Type of Service* and Procedure Code	Code Description	Current Medicaid Fee	Proposed Medicaid Fee
1-C9236/J1300	Injection, eculizumab, 10 mg	Not a Benefit	$176.38
1-J9261	Injection, nelarabine, 50 mg	Not a Benefit	$86.84

*Type of Service Code Key: 1 - Medical Services

TRD-200800100
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: January 8, 2008

♦ ♦ ♦

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on February 4, 2008, at 3:00 p.m. to receive public comment on the proposed Medicaid payment rates for 12 specific Department of Aging and Disability Services (DADS) nursing facility rehabilitative and specialized services occupational, physical, and speech therapy procedure codes listed below. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code, §32.0282, and Texas Administrative Code (TAC), Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates will be effective March 1, 2008. The proposed rates are as follows:

Procedure Code	Description	Current Nursing Facility Rates	Current Outside Contracted Therapist Rates (Minimum Rate)	Current Outside Contracted Therapist Rates (Maximum Rate)	Proposed Medicaid Rate-Nursing Facility	Proposed Medicaid Rate-Outside Contracted Therapist
G0452	OT-Rehabilitative Serv.	$25.00	$66.47	$87.97	$37.70	$95.08
G0453	OT Assessment-Rehabilitative	$25.00	$66.47	$87.97	$37.70	$57.85
G0454	PT-Rehabilitative Serv.	$25.00	$66.76	$87.88	$37.70	$95.08
G0455	PT Assessment-Rehabilitative	$25.00	$66.76	$87.88	$37.70	$54.42
G0456	ST-Rehabilitative Serv.	$25.00	$69.40	$91.33	$37.70	$101.39
G0457	ST Assessment-Rehabilitative	$25.00	$69.40	$91.33	$37.70	$125.44
G0461	OT-NF Specialized Services	$25.00	$66.47	$87.97	$37.70	$95.08
G0462	OT-NF Assessment-Specialized	$25.00	$66.76	$87.88	$37.70	$57.85
G0463	PT-NF Specialized Services	$25.00	$69.40	$91.33	$37.70	$95.08
G0464	PT-NF Assessment-Specialized	$25.00	$66.47	$87.97	$37.70	$54.42
G0465	ST-NF Specialized Services	$25.00	$66.47	$87.97	$37.70	$101.39
G0466	ST-NF Assessment-Specialized	$25.00	$66.76	$87.88	$37.70	$125.44

Methodology and justification. The proposed payment rates for nursing facility rehabilitative and specialized services allow for one specific statewide rate per occupational, physical, and speech therapy evaluation/service and are calculated in accordance with the new reimbursement rule effective February 1, 2008 located at 1 TAC §355.313, Reimbursement Methodology for Rehabilitative and Specialized Services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after January 21, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

TRD-200800103
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: January 8, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
La Porte	Occidental Chemical Corp DBA Oxy Vinyls LP	L06131	La Porte	00	12/14/07
Round Rock	Daughters of Charity Health Services-Austin DBA Seton Medical Center Williamson	L06128	Round Rock	00	12/20/07

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	The Don & Sybil Harrington Cancer Center	L03053	Amarillo	42	12/17/07
Arlington	Arlington Memorial Hospital	L02217	Arlington	89	12/18/07
Arlington	Diagnostic Health Centers of Texas LP DBA Diagnostic Health Arlington	L05033	Arlington	22	12/14/07
Austin	St Davids Healthcare Partnership LP LLP DBA St Davids Medical Center	L00740	Austin	99	12/18/07
Beaumont	Exxonmobil Chemical Company	L02316	Beaumont	36	12/13/07
Brownsville	JRG Equipment DBA Springman Medical Plaza	L05831	Brownsville	06	12/13/07
Carrollton	Medical Edge Healthcare Group PA DBA Heart First	L05555	Carrollton	18	12/14/07
Conroe	CHCA Conroe LP DBA Conroe Regional Medical Center	L01769	Conroe	75	12/14/07
Corpus Christi	Equistar Chemicals LP	L02447	Corpus Christi	20	12/14/07
Corpus Christi	Wilson Inspection X-Ray Services Inc	L04469	Corpus Christi	57	12/17/07
Cypress	North Cypress Medical Center Operating Co DBA North Cypress Medical Center	L06020	Cypress	06	12/21/07
Dallas	Renaissance Hospital Dallas Inc	L05900	Dallas	06	12/13/07
Deer Park	Total Petrochemicals USA Inc	L00302	Deer Park	53	12/17/07
Denton	Columbia Medical Center of Denton Sub. DBA Denton Regional Medical Center	L02764	Denton	63	12/18/07
Denton	Paramount Cardiovascular Associates PA	L05596	Denton	04	12/13/07
Elgin	TXU Mining Company LP DBA Luminant Mining	L04316	Elgin	23	12/12/07
El Paso	Providence Memorial Hospital	L02353	El Paso	92	12/14/07
El Paso	R E Thomason General Hospital	L00502	El Paso	61	12/13/07
El Paso	Southwest Endocrine Consultants	L05617	El Paso	08	12/13/07
El Paso	Tenet Hospitals Limited DBA Sierra Medical Center	L02365	El Paso	62	12/14/07
Fort Worth	Fort Worth Surgicare Partners LTD DBA Medical Centre Surgicare	L05668	Fort Worth	06	12/18/07
Fort Worth	Physician Reliance LP DBA Texas Oncology at Klabzuba	L05545	Fort Worth	27	12/14/07
Fort Worth	Recon Petrotechnologies Inc	L06026	Fort Worth	03	12/19/07
Harlingen	Texas Oncology PA DBA South Texas Cancer Center Harlingen	L00154	Fort Worth	35	12/14/07
Houston	Advanced Cardiac Care Assoc.	L04936	Houston	17	12/19/07
Houston	CCNWHI LP DBA Cy Fair Cancer Center	L06050	Houston	01	12/21/07
Houston	GB Biosciences Corporation	L03521	Houston	23	12/17/07
Houston	Interventional Cardiology Associates	L05294	Houston	10	12/19/07
Houston	James A Smelley MD DBA Northwest Eye Associates	L01413	Houston	12	12/14/07

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Nuclear Imaging Services LP	L05791	Houston	05	12/20/07
Humble	Memorial Hermann Hosptial Systems DBA Memorial Hermann Northwest	L02412	Humble	67	12/14/07
Humble	Mohan Jacob MD PA	L04442	Humble	09	12/13/07
Kerrville	Sid Peterson Memorial Hospital	L01722	Kerrville	35	12/12/07
Linden	Good Shepherd Medical Center Linden Inc	L02721	Linden	22	12/20/07
Longview	Longview Diagnostic Imaging LTD DBA Open Imaging of Longview	L05621	Longview	06	12/21/07
Longview	Longview Regional Hospital Inc DBA Longview Regional Medical Center	L02882	Longview	38	12/11/07
Lubbock	Covenant Health System DBA Covenant Medical Center – Lakeside	L01547	Lubbock	88	12/20/07
Mont Belvieu	Exxonmobil Chemical	L03119	Mont Belvieu	26	12/20/07
Pasadena	Conam Inspection & Engineering Inc	L05010	Pasadena	136	12/14/07
Plano	Presbyterian Hospital of Plano	L04467	Plano	46	12/21/07
Point Comfort	Formosa Plastics Corporation – Texas	L03893	Point Comfort	37	12/19/07
Port Lavaca	Union Carbide Corporation	L00051	Port Lavaca	87	12/27/07
San Angelo	Miltiadis Leon MD	L06102	San Angelo	01	12/27/07
San Antonio	Christus Santa Rosa Health Care	L02237	San Antonio	98	12/18/07
San Antonio	Petnet Solutions Inc	L05569	San Antonio	18	12/14/07
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	111	12/18/07
San Antonio	Veterinary Imaging Center of South Texas PA	L05559	San Antonio	07	12/18/07
San Antonio	VHS San Antonio Partners LLC DBA Baptist Health System	L00455	San Antonio	171	12/13/07
San Antonio	VHS San Antonio Partners LLC DBA Baptist Health System	L00455	San Antonio	172	12/18/07
Stephenville	Stephenville Medical and Surgical Clinic	L05309	Stephenville	12	12/21/07
Texarkana	Christus Health Ark-La-Tex DBA Christus Saint Michael Health System	L04805	Texarkana	20	12/18/07
The Woodlands	Memorial Hospital The Woodlands	L03772	The Woodlands	57	12/14/07
Throughout Tx	Desert Industrial X-Ray LP	L04590	Abilene	74	12/12/07
Throughout Tx	Desert Industrial X-Ray LP	L04590	Abilene	75	12/20/07
Throughout Tx	Team Industrial Services Inc	L00087	Alvin	175	12/20/07
Throughout Tx	Lind & Associates Inc DBA T & N Laboratories & Engineering	L04417	Beaumont	15	12/13/07
Throughout Tx	Brazos Valley Inspection Services Inc	L02859	Bryan	63	12/21/07
Throughout Tx	Professional Service Industries Incorporated	L04938	Clute	08	12/14/07
Throughout Tx	Irisndt Inc	L04769	Deer Park	45	12/14/07
Throughout Tx	Speesoil Inc	L05619	El Paso	03	12/20/07
Throughout Tx	The Dow Chemical Company	L00451	Freeport	82	12/14/07
Throughout Tx	Fugro Consultants LP	L05843	Fort Worth	03	12/21/07
Throughout Tx	Wedge Wireline Services Inc DBA Phoenix Surveys Inc	L04108	Graham	16	12/14/07
Throughout Tx	W W Webber Inc	L04904	Hillsboro	12	12/17/07
Throughout Tx	Houston City of Department of Health and Human Services	L00149	Houston	74	12/27/07
Throughout Tx	Acuren Inspection Inc	L01774	La Porte	239	12/20/07
Throughout Tx	Master Industries Inc	L05872	Liberty	12	12/21/07
Throughout Tx	Techcorr USA LLC	L05972	Pasadena	40	12/20/07
Throughout Tx	University Cancer Center Huntsville Brenham Inc	L06070	Pasadena	01	12/13/07

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
El Paso	Louis M Alpern MD MPH PA DBA The Cataract & Glaucoma Center	L02928	El Paso	07	12/14/07
Irving	Baylor Medical Center at Irving DBA Irving Healthcare System	L02444	Irving	71	12/13/07
Orange	Tin Inc DBA Temple Inland	L01029	Orange	55	12/21/07
Pasadena	Celanese LTD	L01130	Pasadena	71	12/18/07
San Antonio	Radiology Associates of San Antonio PA DBA Advanced Medical Imaging	L05358	San Antonio	27	12/12/07
Snyder	Weaver Services Inc DBA WSI Cased Hole Specialist	L01489	Snyder	31	12/20/07

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Tanox Inc	L04094	Houston	13	12/27/07
Wichita Falls	American Eagle Well Logging Inc	L04133	Wichita Falls	10	12/12/07

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200800030
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: January 3, 2008

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Notice of Agreed Orders

The Department of State Health Services (department) has issued the following agreed orders:

-Larry D. Barbles, DDS (Registration Number R11986) of Clute. The department shall withdraw the full administrative penalty amount of $8,000 for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-NDE Solutions, Inc. (License Number L05879) of College Station. A total penalty of $1,500 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Paincare Acquisition Company XIII (Registration Number R29643) of Palenstine. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Broadway Clinic, Inc. (Registration Number R25644) of Houston. A total penalty of $2,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Hirschfeld Steel Company (License Number L04361) of San Angelo. A total penalty of $3,500 shall be paid by registration for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Thomas M. Reed, DPM, PA (Registration Number R13340) of Conroe. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Brazos Valley Inspection Services, Inc. (License Number L02859) of Bryan. A total penalty of $500 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Non-Destructive Inspection Corporation (License Number L02712) of Lake Jackson. A total penalty of $2,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-McAllen Arthritis & Osteoporosis Center (Registration Number R24879) of Edinburg. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Texas Health Care, LLC Pain Management (Registration Number R29100) of Fort Worth. A total penalty of $750 shall be paid by registration for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-The Heart Institute of East Texas, P.A. (License Number L04147) of Lufkin. A total penalty of $4,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Bruce A. Scudday, DPM (Registration Number R21733) of El Paso. A total penalty of $750 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Goolsby Testing Labs (License Number L03115) of Humble. The department shall probate the full administrative penalty of $5,000 for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Silver Chiropractic Center (Registration Number R20568) of Richardson. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Donald Francis, DDS, PC (Registration Number R23552) of Hurst. A total penalty of $750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Texas Dental Technology School (Registration Number R18908) of Houston. A total penalty of $500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Matrix Metals, LLC (License Number L00312) of Richmond. A total penalty of $1,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Obstetrical & Gynecological Associates (Registration Number M00435) of Corpus Christi. A total penalty of $6,500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Austin Eye Clinic Association (License Number L01642) of Austin. A total penalty of $3,750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Silver Creek Dental (Registration Number R25689) of Pearland. A total penalty of $6,750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Americare Health Center (Registration Number R25220) of Houston. A total penalty of $1,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-King Tool Company (License Number L05142) of Longview. A total penalty of $500 shall be paid by registration for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

-Nannis Family Chiropractic Family Health Center (Registration Number R23440) of Richardson. A total penalty of $1,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, press "1" then press "0", Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200800094
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: January 8, 2008

Schedules of Controlled Substances

PURSUANT TO THE TEXAS CONTROLLED SUBSTANCES ACT, HEALTH AND SAFETY CODE, CHAPTER 481, THESE SCHEDULES SUPERCEDE PREVIOUS SCHEDULES AND CONTAIN THE MOST CURRENT VERSION OF THE SCHEDULES OF ALL CONTROLLED SUBSTANCES FROM THE PREVIOUS SCHEDULES AND MODIFICATIONS.

This annual publication of the Texas Schedules of Controlled Substances was signed by David L. Lakey, Commissioner of Health, and will take effect 21 days following publication of this notice in the *Texas Register*.

Changes to the schedules are designated by an asterisk (*). Additional information can be obtained by contacting the Department of State Health Services, Drugs and Medical Devices Group, 1100 West 49th Street, Austin, Texas 78756. The telephone number is (512) 834-6755 and the website address is http://www.dshs.state.tx.us/dmd.

SCHEDULES

Nomenclature: Controlled substances listed in these schedules are included by whatever official, common, usual, chemical, or trade name they may be designated.

SCHEDULE I

Schedule I consists of:

Schedule I opiates

The following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(2) Allylprodine;

(3) Alphacetylmethadol (except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM);

(4) Alpha-methylfentanyl or any other derivative of Fentanyl;

(5) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidinyl]-N-phenyl-propanamide);

(6) Benzethidine;

(7) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenyl-propanamide);

(8) Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

(9) Betaprodine;

(10) Clonitazene;

(11) Diampromide;

(12) Diethylthiambutene;

(13) Difenoxin;

(14) Dimenoxadol;

(15) Dimethylthiambutene;

(16) Dioxaphetyl butyrate;

(17) Dipipanone;

(18) Ethylmethylthiambutene;

(19) Etonitazene;

(20) Etoxeridine;

(21) Furethidine;

(22) Hydroxypethidine;

(23) Ketobemidone;

(24) Levophenacylmorphan;

(25) Meprodine;

(26) Methadol;

(27) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide), its optical and geometric isomers;

(28) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(29) Moramide;

(30) Morpheridine;

(31) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(32) Noracymethadol;

(33) Norlevorphanol;

(34) Normethadone;

(35) Norpipanone;

(36) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);

(37) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(38) Phenadoxone;

(39) Phenampromide;

(40) Phencyclidine;

(41) Phenomorphan;

(42) Phenoperidine;

(43) Piritramide;

(44) Proheptazine;

(45) Properidine;

(46) Propiram;

(47) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(48) Tilidine; and

(49) Trimeperidine.

Schedule I opium derivatives

The following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, if the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;

(2) Acetyldihydrocodeine;

(3) Benzylmorphine;

(4) Codeine methylbromide;

(5) Codeine-N-Oxide;

(6) Cyprenorphine;

(7) Desomorphine;

(8) Dihydromorphine;

(9) Drotebanol;

(10) Etorphine (except hydrochloride salt);

(11) Heroin;

(12) Hydromorphinol;

(13) Methyldesorphine;

(14) Methyldihydromorphine;

(15) Monoacetylmorphine;

(16) Morphine methylbromide;

(17) Morphine methylsulfonate;

(18) Morphine-N-Oxide;

(19) Myrophine;

(20) Nicocodeine;

(21) Nicomorphine;

(22) Normorphine;

(23) Pholcodine; and

(24) Thebacon.

Schedule I hallucinogenic substances

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following hallucinogenic substances or that contains any of the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation (for the purposes of this Schedule I hallucinogenic substances section only, the term "isomer" includes optical, position, and geometric isomers):

(1) Alpha-ethyltryptamine (some trade or other names: etryptamine; Monase; alpha ethyl-1H-indole-3-ethanamine; 3-(2-aminobutyl) indole; alpha-ET; AET);

(2) alpha-methyltryptamine (AMT), its isomers, salts, and salts of isomers;

(3) 4-bromo-2,5-dimethoxyamphetamine (some trade or other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);

(4) 4-bromo-2,5-dimethoxyphenethylamine (some trade or other names: Nexus; 2C-B; 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB);

(5) 2,5-dimethoxyamphetamine (some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA);

(6) 2,5-dimethoxy-4-ethylamphetamine (some trade or other names: DOET);

(7) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7), its optical isomers, salts and salts of isomers;

(8) 5-methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT), its isomers, salts, and salts of isomers;

(9) 5-methoxy-3,4-methylenedioxy-amphetamine;

(10) 4-methoxyamphetamine (some trade or other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine; PMA);

(11) 1-methyl-4-phenyl-1,2,5,6-tetrahydro-pyridine (MPTP);

(12) 4-methyl-2,5-dimethoxyamphetamine (some trade and other names: 4-methyl-2,5-dimethoxy-alpha-methyl-phenethylamine; "DOM"; and "STP");

(13) 3,4-methylenedioxy-amphetamine;

(14) 3,4-methylenedioxy-methamphetamine (MDMA, MDM);

(15) 3,4-methylenedioxy-N-ethylamphetamine (some trade or other names: N-ethyl-alpha-methyl-3,4(methylenedioxy) phenethylamine; N-ethyl MDA; MDE; MDEA);

(16) 3,4,5-trimethoxy amphetamine;

(17) N-hydroxy-3,4-methylenedioxyamphetamine (Also known as N-hydroxy MDA);

(18) Bufotenine (some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N,N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine);

(19) Diethyltryptamine (some trade and other names: N,N-Diethyltryptamine; DET);

(20) Dimethyltryptamine (some trade and other names: DMT);

(21) Ethylamine Analog of Phencyclidine (some trade or other names: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl) ethylamine; N-(1-phenylcyclohexyl)-ethylamine; cyclohexamine; PCE);

(22) Ibogaine (some trade or other names: 7-Ethyl-6,6-beta, 7,8,9,10,12,13-octhydro-2-methoxy-6,9-methano-5H-pyrido[1',2':1,2] azepino [5,4-b] indole; taber-nanthe iboga);

(23) Lysergic acid diethylamide;

(24) Marihuana;

(25) Mescaline;

(26) N-benzylpiperazine (some other names: BZP; 1-benzylpiperazine), its optical isomers, salts and salts of isomers;

(27) N-ethyl-3-piperidyl benzilate;

(28) N-methyl-3-piperidyl benzilate;

(29) Parahexyl (some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo [b,d] pyran; Synhexyl);

(30) Peyote, unless unharvested and growing in its natural state, meaning all parts of the plant classified botanically as *Lophophora*, whether growing or not, the seeds of the plant, an extract from a part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or extracts;

(31) Psilocybin;

(32) Psilocin;

(33) Pyrrolidine analog of phencyclidine (some trade or other names: 1-(1-phenyl-cyclohexyl)-pyrrolidine, PCPy, PHP);

(34) Tetrahydrocannabinols;

meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following:

1 cis or trans tetrahydrocannabinol, and their optical isomers;

6 cis or trans tetrahydrocannabinol, and their optical isomers; and

3,4 cis or trans tetrahydrocannabinol, and its optical isomers.

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.);

(35) Thiophene analog of phencyclidine (some trade or other names: 1-[1-(2-thienyl) cyclohexyl] piperidine; 2-thienyl analog of phencyclidine; TPCP); and

(36) 1-[1-(2-thienyl)cyclohexyl] pyrrolidine (some trade or other names: TCPy).

Schedule I stimulants

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Aminorex (some other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; 4,5-dihydro-5-phenyl-2-oxazolamine);

(2) Cathinone (some trade or other names: 2-amino-1-phenyl-1-propanone; alpha-aminopropiophenone; 2-aminopropiophenone and norephedrone);

(3) Fenethylline;

(4) Methcathinone (some other names: 2-(methylamino)-propiophenone; alpha-(methylamino) propiophenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; monomethylpropion; ephedrone; N-methylcathinone; methylcathinone; AL-464; AL-422; AL-463; and UR1432);

(5) 4-methylaminorex;

(6) N-ethylamphetamine; and

(7) N,N-dimethylamphetamine (some other names: N,N-alpha-trimethylbenzene-ethaneamine; N,N-alpha-trimethylphenethylamine).

Schedule I depressants

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Gamma-hydroxybutyric acid (some other names include GHB; gamma-hydroxybutyrate; 4-hydroxybutyrate; 4-hydroxybutanoic acid; sodium oxybate; sodium oxybutyrate);

(2) Mecloqualone; and

(3) Methaqualone.

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis

The following substances, however produced, except those narcotic drugs listed in other schedules:

(1) Opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine-derived butorphanol, naloxone and its salts, naltrexone and its salts, and nalmefene and its salts, but including:

(1-1) Codeine;

(1-2) Dihydroetorphine;

(1-3) Ethylmorphine;

(1-4) Etorphine hydrochloride;

(1-5) Granulated opium;

(1-6) Hydrocodone;

(1-7) Hydromorphone;

(1-8) Metopon;

(1-9) Morphine;

(1-10) Opium extracts;

(1-11) Opium fluid extracts;

*(1-12) Oripavine

(1-13) Oxycodone;

(1-14) Oxymorphone;

(1-15) Powdered opium;

(1-16) Raw opium;

(1-17) Thebaine; and

(1-18) Tincture of opium.

(2) A salt, compound, isomer, derivative, or preparation of a substance that is chemically equivalent or identical to a substance described by Paragraph (1) of Schedule II substances, vegetable origin or chemical synthesis, other than the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Cocaine, including:

(4-1) its salts, its optical, position, and geometric isomers, and the salts of those isomers; and

(4-2) coca leaves and a salt, compound, derivative, or preparation of coca leaves that is chemically equivalent or identical to a substance described by this paragraph, other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and

(5) Concentrate of poppy straw, meaning the crude extract of poppy straw in liquid, solid, or powder form that contains the phenanthrene alkaloids of the opium poppy.

Opiates

The following opiates, including their isomers, esters, ethers, salts, and salts of isomers, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alfentanil;

(2) Alphaprodine;

(3) Anileridine;

(4) Bezitramide;

(5) Carfentanil;

(6) Dextropropoxyphene, bulk (nondosage form);

(7) Dihydrocodeine;

(8) Diphenoxylate;

(9) Fentanyl;

(10) Isomethadone;

(11) Levo-alphacetylmethadol (some trade or other names: levo-alpha-acetylmethadol, levomethadyl acetate, LAAM);

(12) Levomethorphan;

(13) Levorphanol;

(14) Metazocine;

(15) Methadone;

(16) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

(17) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid;

(18) Pethidine (meperidine);

(19) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(20) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(21) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(22) Phenazocine;

(23) Piminodine;

(24) Racemethorphan;

(25) Racemorphan;

(26) Remifentanil; and

(27) Sufentanil.

Schedule II stimulants

Unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, Section 481.033, a

material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, including its salts, optical isomers, and salts of optical isomers;

(3) Methylphenidate and its salts; and

(4) Phenmetrazine and its salts.

*(5) Lisdexamfetamine, including its salts, isomers, and salts of its isomers.

Schedule II depressants

Unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;

(2) Glutethimide;

(3) Pentobarbital; and

(4) Secobarbital.

Schedule II hallucinogenic substances

(1) Nabilone (Another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one).

Schedule II precursors

Unless specifically excepted or listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances:

(1) Immediate precursor to methamphetamine:

(1-1) Phenylacetone and methylamine if possessed together with intent to manufacture methamphetamine;

(2) Immediate precursor to amphetamine and methamphetamine:

(2-1) Phenylacetone (some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone); and

(3) Immediate precursors to phencyclidine (PCP):

(3-1) 1-phenylcyclohexylamine; and

(3-2) 1-piperidinocyclohexanecarbonitrile (PCC).

SCHEDULE III

Schedule III consists of:

Schedule III depressants

Unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, Section 481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) a compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any of their salts and one or more active medicinal ingredients that are not listed in a schedule;

(2) a suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any of their salts and approved by the Food and Drug Administration for marketing only as a suppository;

(3) a substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances that are specifically listed in other schedules;

(4) Chlorhexadol;

(5) Any drug product containing gamma hydroxybutyric acid, including its salts, isoners, and salts of isomers, for which an application is approved under Federal Food Drug and Cosmetic Act, Section 505;

(6) Ketamine, its salts, isomers, and salts of isomers. Some other names for ketamine: (±)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone;

(7) Lysergic acid;

(8) Lysergic acid amide;

(9) Methyprylon;

(10) Sulfondiethylmethane;

(11) Sulfonethylmethane;

(12) Sulfonmethane; and

(13) Tiletamine and zolazepam or any salt thereof. Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethyl-pyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one, flupyrazapon.

Nalorphine

Schedule III narcotics

Unless specifically excepted or unless listed in another schedule:

(1) a material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any of their salts:

(1-1) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(1-2) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(1-3) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(1-4) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-5) not more than 1.8 grams of dihydrocodeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(1-6) not more than 300 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(1-7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts; and

(1-8) not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams with one or more active, non-narcotic ingredients in recognized therapeutic amounts.

(2) any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts:

(2-1) Buprenorphine.

Schedule III stimulants

Unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of the substance's isomers, if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Benzphetamine;

(2) Chlorphentermine;

(3) Clortermine; and

(4) Phendimetrazine.

Schedule III anabolic steroids and hormones

Anabolic steroids, including any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone), and include the following:

(1) androstanediol

(1-1) 3 beta,17 beta-dihydroxy-5 alpha-androstane;

(1-2) 3 alpha,17 beta -dihydroxy-5 alpha-androstane;

(2) androstanedione (5 alpha-androstan-3,17-dione);

(3) androstenediol--

(3-1) 1-androstenediol (3 beta,17 beta-dihydroxy-5 alpha-androst-1-ene);

(3-2) 1-androstenediol (3 alpha,17 beta-dihydroxy-5 alpha-androst-1-ene);

(3-3) 4-androstenediol (3 beta,17 beta-dihydroxy-androst-4-ene);

(3-4) 5-androstenediol (3 beta,17 beta-dihydroxy-androst-5-ene);

(4) androstenedione--

(4-1) 1-androstenedione ([5 alpha]-androst-1-en-3,17-dione);

(4-2) 4-androstenedione (androst-4-en-3,17-dione);

(4-3) 5-androstenedione (androst-5-en-3,17-dione);

(5) bolasterone (7 alpha,17 alpha-dimethyl-17 beta-hydroxyandrost-4-en-3-one);

(6) boldenone (17 beta-hydroxyandrost-1,4,-diene-3-one);

(7) calusterone (7 beta,17 alpha-dimethyl-17 beta-hydroxyandrost-4-en-3-one);

(8) clostebol (4-chloro-17 beta-hydroxyandrost-4-en-3-one);

(9) dehydrochloromethyltestosterone (4-chloro-17 beta-hydroxy-17alpha-methyl-androst-1,4-dien-3-one);

(10) delta-1-dihydrotestosterone (a.k.a. '1-testosterone') (17 beta-hydroxy-5 alpha-androst-1-en-3-one);

(11) 4-dihydrotestosterone (17 beta-hydroxy-androstan-3-one);

(12) drostanolone (17 beta-hydroxy-2 alpha-methyl-5 alpha-androstan-3-one);

(13) ethylestrenol (17 alpha-ethyl-17 beta-hydroxyestr-4-ene);

(14) fluoxymesterone (9-fluoro-17 alpha-methyl-11 beta,17 beta-dihydroxyandrost-4-en-3-one);

(15) formebolone (2-formyl-17 alpha-methyl-11 alpha,17 beta-dihydroxyandrost-1,4-dien-3-one);

(16) furazabol (17 alpha-methyl-17 beta-hydroxyandrostano[2,3-c]-furazan);

(17) 13 beta-ethyl-17 beta-hydroxygon-4-en-3-one;

(18) 4-hydroxytestosterone (4,17 beta-dihydroxy-androst-4-en-3-one);

(19) 4-hydroxy-19-nortestosterone (4,17 beta-dihydroxy-estr-4-en-3-one);

(20) mestanolone (17 alpha-methyl-17 beta-hydroxy-5 alpha-androstan-3-one);

(21) mesterolone (1 alpha-methyl-17 beta-hydroxy-[5 alpha]-androstan-3-one);

(22) methandienone (17 alpha-methyl-17 beta-hydroxyandrost-1,4-dien-3-one);

(23) methandriol (17 alpha-methyl-3 beta,17 beta-dihydroxyandrost-5-ene);

(24) methenolone (1-methyl-17 beta-hydroxy-5 alpha-androst-1-en-3-one);

(25) 17 alpha-methyl-3 beta, 17 beta-dihydroxy-5 alpha-androstane;

(26) 17 alpha-methyl-3 alpha,17 beta-dihydroxy-5 alpha-androstane;

(27) 17 alpha-methyl-3 beta,17 beta-dihydroxyandrost-4-ene;

(28) 17 alpha-methyl-4-hydroxynandrolone (17 alpha-methyl-4-hydroxy-17 beta-hydroxyestr-4-en-3-one);

(29) methyldienolone (17 alpha-methyl-17 beta-hydroxyestra-4,9(10)-dien-3-one);

(30) methyltrienolone (17 alpha-methyl-17 beta-hydroxyestra-4,9-11-trien-3-one);

(31) methyltestosterone (17 alpha-methyl-17 beta-hydroxyandrost-4-en-3-one);

(32) mibolerone (7 alpha,17 alpha-dimethyl-17 beta-hydroxyestr-4-en-3-one);

(33) 17 alpha-methyl-delta-1-dihydrotestosterone (17 beta-hydroxy-17 alpha-methyl-5 alpha-androst-1-en-3-one) (a.k.a. '17-alpha-methyl-1-testosterone');

(34) nandrolone (17 beta-hydroxyestr-4-en-3-one);

(35) norandrostenediol--

(35-1) 19-nor-4-androstenediol (3 beta, 17 beta-dihydroxyestr-4-ene);

(35-2) 19-nor-4-androstenediol (3 alpha, 17 beta-dihydroxyestr-4-ene);

(35-3) 19-nor-5-androstenediol (3 beta, 17 beta-dihydroxyestr-5-ene);

(35-4) 19-nor-5-androstenediol (3 alpha, 17 beta-dihydroxyestr-5-ene);

(36) norandrostenedione--

(36-1) 19-nor-4-androstenedione (estr-4-en-3,17-dione);

(36-2) 19-nor-5-androstenedione (estr-5-en-3,17-dione;

(37) norbolethone (13 beta,17alpha-diethyl-17 beta-hydroxygon-4-en-3-one);

(38) norclostebol (4-chloro-17 beta-hydroxyestr-4-en-3-one);

(39) norethandrolone (17 alpha-ethyl-17 beta-hydroxyestr-4-en-3-one);

(40) normethandrolone (17 alpha-methyl-17 beta-hydroxyestr-4-en-3-one);

(41) oxandrolone (17 alpha-methyl-17 beta-hydroxy-2-oxa-[5 alpha]-androstan-3-one);

(42) oxymesterone (17 alpha-methyl-4,17 beta-dihydroxyandrost-4-en-3-one);

(43) oxymetholone (17 alpha-methyl-2-hydroxymethylene-17 beta-hydroxy-[5 alpha]-androstan-3-one);

(44) stanozolol (17 alpha-methyl-17 beta-hydroxy-[5 alpha]-androst-2-eno[3,2-c]-pyrazole);

(45) stenbolone (17 beta-hydroxy-2-methyl-[5 alpha]-androst-1-en-3-one);

(46) testolactone (13-hydroxy-3-oxo-13,17-secoandrosta-1,4-dien-17-oic acid lactone);

(47) testosterone (17 beta-hydroxyandrost-4-en-3-one);

(48) tetrahydrogestrinone (13 beta,17 alpha-diethyl-17 beta-hydroxygon-4,9,11-trien-3-one);

(49) trenbolone (17 beta-hydroxyestr-4,9,11-trien-3-one); and

(50) any salt, ester, or ether of a drug or substance described in this paragraph.

Schedule III hallucinogenic substances

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in U.S. Food and Drug Administration approved drug product. (Some other names for dronabinol:(6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-tri-methyl-3-pentyl-6H-dibenzo[b,d]pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol).

SCHEDULE IV

Schedule IV consists of:

Schedule IV depressants

Except as provided by the Texas Controlled Substances Act, Health and Safety Code, Section 481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Alprazolam;

(2) Barbital;

(3) Bromazepam;

(4) Camazepam;

(5) Chloral betaine;

(6) Chloral hydrate;

(7) Chlordiazepoxide;

(8) Clobazam;

(9) Clonazepam;

(10) Clorazepate;

(11) Clotiazepam;

(12) Cloxazolam;

(13) Delorazepam;

(14) Diazepam;

(15) Dichloralphenazone;

(16) Estazolam;

(17) Ethchlorvynol;

(18) Ethinamate;

(19) Ethyl loflazepate;

(20) Fludiazepam;

(21) Flunitrazepam;

(22) Flurazepam;

(23) Halazepam;

(24) Haloxazolam;

(25) Ketazolam;

(26) Loprazolam;

(27) Lorazepam;

(28) Lormetazepam;

(29) Mebutamate;

(30) Medazepam;

(31) Meprobamate;

(32) Methohexital;

(33) Methylphenobarbital (mephobarbital);

(34) Midazolam;

(35) Nimetazepam;

(36) Nitrazepam;

(37) Nordiazepam;

(38) Oxazepam;

(39) Oxazolam;

(40) Paraldehyde;

(41) Petrichloral;

(42) Phenobarbital;

(43) Pinazepam;

(44) Prazepam;

(45) Quazepam;

(46) Temazepam;

(47) Tetrazepam;

(48) Triazolam;

(49) Zaleplon;

(50) Zolpidem; and

(51) Zopiclone, its salts, isomers, and salts of isomers.

Schedule IV stimulants

Unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of those isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Cathine [(+)-norpseudoephedrine];

(2) Diethylpropion;

(3) Fencamfamin;

(4) Fenfluramine;

(5) Fenproporex;

(6) Mazindol;

(7) Mefenorex;

(8) Modafinil;

(9) Pemoline (including organometallic complexes and their chelates);

(10) Phentermine;

(11) Pipradrol;

(12) SPA [(-)-1-dimethylamino-1,2-diphenylethane]; and

(13) Sibutramine.

Schedule IV narcotics

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs or their salts:

(1) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit; and

(2) Dextropropoxyphene (Alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane).

Schedule IV other substances

Unless specifically excepted or unless listed in another schedule, a material, compound, substance's salts:

(1) Butorphanol, including its optical isomers; and

(2) Pentazocine, its salts, derivatives, compounds, or mixtures.

SCHEDULE V

Schedule V consists of:

Schedule V narcotics containing non-narcotic active medicinal ingredients

A compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs that also contain one or more non-narcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliters or per 100 grams;

(2) Not more than 100 milligrams of dihydrocodeine, or any of its salts, per 100 milliliters or per 100 grams;

(3) Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams;

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) Not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams; and

(6) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

Schedule V stimulants

Unless specifically exempted or excluded or unless listed in another schedule, a compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

(1) Pyrovalerone.

Schedule V depressants

Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts:

(1) Pregabalin [(S)-3-(aminomethyl)-5-methylhexanoic acid].

TRD-200800037
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: January 4, 2008

♦ ♦ ♦

Texas Department of Insurance, Division of Workers' Compensation

Correction of Error

The Texas Department of Insurance, Division of Workers' Compensation adopted an amendment to 28 TAC §134.1 and new §§134.2, 134.203 and 134.204 regarding Medical Fee Guidelines in the January 11, 2008, issue of the *Texas Register* (33 TexReg 364). The department also adopted new §134.403 and §134.404 concerning Hospital Fee Guidelines in the January 11, 2008, issue of the *Texas Register* (33 TexReg 400).

Due to errors in the agency's submissions, the effective date of January 17, 2008 that appears on pages 400 and 428 is incorrect. The rule adoptions will take effect on March 1, 2008.

TRD-200800091

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Texas Lottery Commission

Correction of Error

The Texas Lottery Commission published a notice of adopted rule review for Chapter 402, concerning Charitable Bingo, in the December 21, 2007, *Texas Register* (32 TexReg 9737). In the third paragraph, the last two sentences should be omitted because the Commission received no comments concerning the proposed review of Chapter 402.

The paragraph should reads as follows.

"This review and re-adoption has been conducted in accordance with Texas Government Code, §2001.039. The Commission received no comments on the proposed review, which was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7086)."

TRD-200800092

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North Central Texas Council of Governments

Request for Proposals to Develop Improvements to NCTCOG's Dallas/Fort Worth Regional Travel Model (DFWRTM)

Consultant Proposal Request

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The North Central Texas Council of Governments (NCTCOG) is requesting written proposals from consultant firm(s) to develop improvements to NCTCOG's Dallas/Fort Worth Regional Travel Model (DFWRTM). The DFWRTM is NCTCOG's official travel demand model and is used to develop travel forecasts to support the regional transportation planning in the DFW region. NCTCOG desires to improve the DFWRTM's performance, capabilities, and coverage area. As part of a comprehensive effort to update and improve the DFWRTM, NCTCOG seeks to create a vehicle ownership model and update the mode choice model. This study will focus only on the vehicle ownership and mode choice models. In parallel, NCTCOG staff will implement an improvement plan that includes other model components, which will be closely coordinated with the consultant selected for this effort. The budget for this study is approximately $135,000.

Due Date

Proposals must be received no later than 5 p.m., Central Daylight Time, on Friday, February 15, 2008, to Arash Mirzaei, Transportation System Modeling Manager, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 or P.O. Box 5888, Arlington, Texas 76005-5888. For copies of the Request for Proposals, contact Therese Bergeon, at (817) 695-9267.

Contract Award Procedures

The firm or individual selected to perform these activities will be recommended by a Consultant Selection Committee (CSC). The CSC will use evaluation criteria and methodology consistent with the scope of services contained in the Request for Proposals. The NCTCOG Executive Board will review the CSC's recommendations and, if found acceptable, will issue a contract award.

Regulations

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-200800118
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: January 9, 2008

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on Richmond Material Co.'s application for a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel from the Brazos River bed in Fort Bend County at a location approximately 3 miles downstream from Highway 90A and 3.8 miles upstream from U.S. 59 crossing.

The hearing will be held at 11:00 a.m. on Monday, February 11, 2008 at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, TPWD, by mail: 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4482; or e-mail, beth.hilliard@tpwd.state.tx.us.

TRD-200800102
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: January 8, 2008

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Texas Department of Public Safety

Controlled Substances - Notice of Public Hearing

The Texas Department of Public Safety, in accordance with Administrative Procedures and Texas Register Act, Texas Government Code, Chapter 2001, et seq., is holding a public hearing on January 24, 2008, at 10:00 a.m., in the Texas Department of Public Safety Criminal Law Enforcement (CLE) Building (Building E), in the Auditorium, 6100 Guadalupe Street, Austin, Texas. Visitor parking is available, but limited, in the department parking lot.

The purpose of this hearing is to receive comments from all interested persons regarding adoption of amendments to 37 Texas Administrative Code §§13.71 - 13.85 and §13.207, regarding Controlled Substances, proposed under the authority of Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act. The proposed rules were published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8709 and 32 TexReg 8712).

The hearing is in response to a request for public hearing received jointly from the Texas Pharmacy Association, the Texas Federation of Drug Stores, and the Texas Society of Health-System Pharmacists.

To facilitate seating at the public hearing, persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. This correspondence should be addressed to Johnny R. Hatcher, Manager, Narcotics Regulatory Programs, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433.

Individual comments may be limited to ten minutes in duration, depending upon the number of attendees.

Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print, or Braille, are requested

to contact Johnny R. Hatcher at (512) 424-2458, three working days prior to the hearing so that appropriate arrangements can be made.

TRD-200800105
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: January 9, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 7, 2008, for a amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Marcus Cable Associates, L.L.C. d/b/a Charter Communications for a Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35198 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the Cities of Sansom and Argyle, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35198.

TRD-200800096
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 8, 2008

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Notice of Amended Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in Chambers, Hardin, Jasper, Jefferson, Liberty, Newton, and Orange Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an amended application on December 28, 2007, for a certificate of convenience and necessity for a proposed transmission line in Chambers, Hardin, Jasper, Jefferson, Liberty, Newton and Orange Counties, Texas.

Docket Style and Number: Application of Kelson Transmission Company, LLC for a Certificate of Convenience and Necessity for the Amended Proposed Canal to Deweyville 345 kV Transmission Line Within Chambers, Hardin, Jasper, Jefferson, Liberty, Newton, and Orange Counties, Docket Number 34611.

The Application: The amended application of Kelson Transmission Company, LLC (Kelson Transmission) for a proposed transmission line is designated as the Canal to Deweyville Transmission Line Project. Kelson Transmission has amended its original application to add several route segments to create alternate routes in Liberty and Jefferson Counties. In addition, Kelson Transmission proposes in this amended application to terminate the proposed line at a new switching station to be located northwest of Mont Belvieu. This amendment eliminates the majority of the line segments in the original application going through Mont Belvieu and all of the routes that were to pass through Baytown. The miles of right-of-way for this amended project will be approximately 95 miles of double circuit 345-kV electric transmission line between the proposed Canal Switching Station to be located in northwestern Chambers County, Texas and the proposed Deweyville Switching Station to be located in southeastern Newton County, Texas. The estimated date to energize facilities is May 2010.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is February 11, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 34611.

TRD-200800060
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 7, 2008

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on January 7, 2008, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Potentia Energy LLC for Retail Electric Provider (REP) Certification, Docket Number 35199 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 25, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35199.

TRD-200800097
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 8, 2008

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Notice of Application to Amend Certificated Service Area Boundaries in Cameron County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on January 3, 2008, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County (Maine Place Subdivision). Docket Number 35188.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from William A. Faulk, Sr. requesting BPUB to provide electric utility service to a proposed 22.13-acre subdivision. The estimated cost to BPUB to provide service to this proposed area is $55,652.30. The area is presently undeveloped. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than January 25, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35188.

TRD-200800063
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 7, 2008

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Notice of a Petition for Declaratory Ruling

Notice is given to the public of a petition for declaratory ruling filed with the Public Utility Commission of Texas (commission) on December 28, 2007, pursuant to Public Utility Regulatory Act §§14.001, 37.001-061, 37.154, and P.U.C. Substantive Rule §25.101(f).

Docket Style and Number: Joint Petition of Texas Industrial Energy Consumers and Office of Public Utility Counsel for Declaratory Ruling, Docket Number 35183.

The Application: Petitioners request the commission make a declaratory ruling that Entergy Gulf States, Inc. (EGSI), an electric utility, is required under the terms of the Public Utility Regulatory Act §37.154 and P.U.C. Substantive Rule §25.101(f) to seek and receive commission approval to transfer its Certificate of Convenience and Necessity (CCN) to Entergy Texas, Inc. (Entergy Texas) prior to the time the transfer takes place.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35183.

TRD-200800061
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 7, 2008

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Public Notice of Workshop on Revision of Form for Earnings Monitoring Report for Telephone Utility Companies

The Public Utility Commission of Texas (commission) will hold on Friday, February 1, 2008, a workshop regarding the revision of the form used by regulated telephone utility companies for the filing of earnings monitoring reports pursuant to P.U.C. Substantive Rule §26.73. The workshop will be held from 9:30 a.m. to 12:00 p.m. in the Commissioners' Hearing Room on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 35187, *Revision of Form for Earnings Monitoring Reports filed by Regulated Telephone Utility Companies*, has been established for this proceeding.

By January 18, 2008, the commission staff will make available in Central Records under Project Number 35187 a copy of a draft report form for discussion at the workshop. The draft forms will also be available for download by visiting the commission's website at www.puc.state.tx.us and clicking on the Filings/Interchange and Filings Retrieval links.

Questions concerning the workshop or this notice should be referred to Darryl Tietjen, Director of Rate Regulation, at 512-936-7436 or darryl.tietjen@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200800062
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 7, 2008

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Scheduling Notice for Implementation Project Relating to Advanced Metering

The meetings listed below are scheduled for interested parties in Project Number 34610, *Implementation Project Relating to Advanced Metering*. Web conference and dial-in information will be provided on the project website at:

http://www.puc.state.tx.us/electric/projects/34610/34610.cfm

Questions concerning this notice should be referred to Christine Wright, Competitive Markets Division at (512) 936-7376, or christine.wright@puc.state.tx.us.

Advanced Metering Implementation Team (AMIT)

January

Jan. 14-15 - Overall Project Scoping Meeting

Mon: 9:30-5:30

Tue: 8:30-4:30

Location: Capitol Extension, Room E2.030

A map is available online at:

http://www.tspb.state.tx.us/SPB/Plan/FloorPlan/pdf/CapitolComplex%20b&w.pdf

Information for parking is available online at:

http://www.tspb.state.tx.us/SPB/Plan/Parking.htm

Jan. 22-23 - Project #2, Web Portal

Tue: 9:30-5:30

Wed: 8:30-4:30

Location: Capitol Extension, Room E2.030

Jan. 28 - Project #1, Interim Project

Mon: 9:30-5:30

Location: Capitol Extension, Room E2.030

February

Feb. 5-6 - Project #1, Interim Project

Tue: 9:30-5:30

Wed: 8:30-4:30

Location: ERCOT, 7620 Metro Center Dr., Austin, TX 78744

Feb. 11-12 - Project #2, Web Portal

Mon: 9:30-5:30

Tue: 8:30-4:30

Location: Capitol Extension, Room E2.030

Feb. 19-20 - Project #1, Interim Project

Tue: 9:30-5:30

Wed: 8:30-4:30

Location: Capitol Extension, Room E2.030

Feb. 25-26 - Project #2, Web Portal

Mon: 9:30-5:30

Tue: 8:30-4:30

Location: Capitol Extension, Room E2.030

March

Mar. 4 - Projects #1-2, Web Portal/Interim Projects

Mon: 9:30-5:30

Location: Austin Energy, 721 Barton Springs Road, Austin, TX 78704

Parking is available in the parking garage behind the building.

Mar. 13-14 - Project #5, Retail Market Interface

Thu: 9:30-5:30

Fri: 8:30-4:30

Location: Capitol Extension, Room E2.030

Mar. 25-26 - Project #5, Retail Market Interface

Tue: 9:30-5:30

Wed: 8:30-4:30

Location: Public Utility Commission, CHR, 7th Floor, 1701 N. Congress Ave, Austin, TX 78701

TRD-200800104
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 8, 2008

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Office of the Secretary of State

Model State Administrative Procedure Act Revision--Invitation to Participate

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is revising its Model State Administrative Procedure Act (MSAPA). NCCUSL invites organizations and individuals interested in state administrative agency processes to participate in this effort.

NCCUSL is a 117 year old national organization of lawyers, judges and law professors who are appointed to represent their states in drafting and seeking enactment of uniform laws to facilitate commerce and certainty in the law among the states. For more information about NCCUSL, visit http://www.nccusl.org/.

The goal of the MSAPA drafting committee is to make the administrative process more efficient, accessible and fair. The most recent draft of MSAPA is available at http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=234. The drafting process will not be completed until the spring of 2009.

The MSAPA drafting committee invites interested parties to attend committee meetings as an observer and make comments and suggestions at the meetings or by submitting them in writing. To become an observer, please contact Ms. Leang Sou at NCCUSL at (312) 450-6606 or at leang.sou@nccusl.org. Submit written comments about the MSAPA to Commissioner Francis J. Pavetti, 18 The Strand, Goshen Point, Waterford, CT 06385.

TRD-200800088
Lorna Wassdorf
Director of Business and Public Filings
Office of the Secretary of State
Filed: January 7, 2008

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Architectural/Engineering Services

The County of Hutchinson, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional architectural/engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation architectural/engineering design services described below:

Current Project: TxDOT CSJ No. 08TBBORGR. Scope: Provide architectural/engineering services to design new airport terminal building.

The HUB goal is set at 5%. TxDOT Project Manager is John Greer, P.E.

To assist in your proposal preparation the most recent Airport Layout Plan, 5010 drawing, and the criteria are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting Hutchinson County Airport. The proposal should address a technical approach for the current scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Architectural/Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at **www.dot.state.tx.us/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a

previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than February 8, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluating architectural/engineering proposals can be found at **http://www.dot.state.tx.us/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager at 1-800-68-PILOT at extension 4518. For technical questions, please contact John Greer, at 1-800-68-PILOT at extension 4528.

TRD-200800115
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 9, 2008

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Aviation Division - Request for Proposal for Aviation Engineering Services

The County of Crane, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: Crane County. TxDOT CSJ No. 0806CRANE. Scope: Provide engineering/design services to replace rotating beacon and tower; replace LIRLs with MIRLs, runway 12-30 and relocate segmented circle/lighted windcone at the Crane County Airport.

The **HUB** goal is set at 5%. TxDOT Project Manager is Clayton Bridwell.

To assist in your proposal preparation the criteria, 5010 drawing and most recent airport layout plan are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Crane County Airport."

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at **www.dot.state.tx.us/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than February 12, 2008 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at **http://www.dot.state.tx.us/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager at 1-800-68-PILOT at extension 4517. For technical questions, please contact Clayton Bridwell, at 1-800-68-PILOT at extension 4531.

TRD-200800114
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 9, 2008

♦ ♦ ♦

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Edinburg, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: City of Edinburg. TxDOT CSJ No. 0821EDNBG. Scope: Overlay apron; overlay and mark runway 14-32; overlay and mark A, N, R; rehabilitate hangar access taxiway; install REILs for runway 14; install hold signs and replace perimeter fence at the Edinburg International Airport.

The **DBE** goal is set at 5%. TxDOT Project Manager is John Wepryk, P.E.

To assist in your proposal preparation the criteria, 5010 drawing, project narrative, and most recent airport layout plan are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "South Texas International Airport at Edinburg."

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be re-

quested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at **www.dot.state.tx.us/services/aviation/consultant.htm.** The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than February 12, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at http://www.dot.state.tx.us/services/aviation/consultant.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager at 1-800-68-PILOT at extension 4517. For technical questions, please contact John Wepryk, at 1-800-68-PILOT at extension 4533.

TRD-200800117
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 9, 2008

♦ ♦ ♦

Cancellation of Bolivar Bridge EIS

In the February 20, 2006, issue of the *Texas Register* (31 TexReg 936), the Texas Department of Transportation issued a Notice of Intent notifying the public that an Environmental Impact Statement (EIS) would be prepared for a proposed State Highway (SH 87) bridge connecting Galveston Island and Bolivar Peninsula in Galveston County, Texas. The project is now cancelled; therefore, no further project activities will occur.

Agency Contact: Comments or concerns regarding this proposed action should be sent to Dianna F. Noble, P.E., Texas Department of Transportation, Environmental Affairs Division, 125 East 11th Street, Austin, Texas 78701, telephone (512) 416-2734.

TRD-200800116
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 9, 2008

♦ ♦ ♦

The University of Texas System

Award of Consultant Contract Notification

The University of Texas System Administration ("University"), in accordance with the provisions of Texas Government Code, Chapter 2254, entered into a contract for consulting services (the "Contract") with Aviation Research Group, U.S., Inc. ("Consultant") as more particularly described in the Invitation for Offers by The University of Texas System Administration for Selection of a Consultant to Provide Services related to Aviation Consulting published in the *Texas Register* on November 2, 2007 (32 TexReg 8060).

Project Description:

In accordance with the Invitation and Consultant's response thereto, Consultant shall provide University with services to:

* Determine and outline charter service needs.

* Establish guidelines for charter service operators.

* Develop a Request For Proposal (RFP) for charter services.

* Evaluate RFP submissions.

* Establish standardized charter service agreement templates.

* Evaluate individual charters as proposed.

* Review internal flight operations and processes.

Name and Address of Consultant:

Aviation Research Group, U.S., Inc.

212 West 8th Street

Cincinnati, Ohio 45202

Total Value of the Contract:

$80,000

Contract Dates:

The Contract was executed by Consultant on December 19, 2007, and by the University on January 8, 2008, and dated effective January 21, 2008.

Due Dates for Contract Products:

Aviation consulting services shall be completed and delivered to the University as follows:

* Within three months - help develop guidelines pertaining to an RFP for charter services.

* Within six months - review internal flight operations, processes and develop templates.

* Ongoing - evaluate individual charters as proposed.

The term of the Contract shall terminate on January 20, 2009.

TRD-200800107
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: January 9, 2008

♦ ♦ ♦

Invitation for Consultants to Provide Offers of Consulting Services

In accordance with the provisions of *Texas Government Code*, §2254.02, The University of Texas System, "the University", is looking for a Proposer to provide the assistance the University requires to assess the competitiveness of the compensation currently provided to its police force. The requested work will cover approximately 14 different levels of police positions at U.T. institutions.

The Chancellor of the University has made a finding that the Consulting Services are necessary. While the University has a substantial need for the Consulting Services, the University does not currently have staff with expertise or experience with the Consulting Services and the University cannot obtain such Consulting Services through a contract with another state governmental entity.

Unless the University receives a better offer, the University intends to amend its contract for the consulting services solicited under this invitation to Mercer Human Resources Consulting, Inc., a consultant that is providing consulting services relating to executive compensation to the University. The University of Texas System Administration is currently using the services of Mercer Human Resources Consulting, Inc. to provide competitive market data on total compensation for executive officers of the University.

The award for services will be based on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal, give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

The individual to be contacted with an offer to provide such consulting services is:

Gary Gwaltney

Manager of Compensation and Employment

The University of Texas System

702 Colorado Street

Suite 2.100

Austin, Texas 78701

Voice: (512) 499-4587

E-mail: ggwaltney@utsystem.edu

The proposal submission deadline will be January 28, 2008.

TRD-200800106
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: January 9, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affecte***d. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).